San Francisco
Law Library
No. .....

Presented by .....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 2528

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN FOUR VOLUMES.)

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

vs.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation, Organized Under the Laws of the State of Nevada,

Appellee.

VOLUME IV.

(Pages 961 to 1239, Inclusive.)

Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2528

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN FOUR VOLUMES.)

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

vs.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation, Organized Under the Laws of the State of Nevada,

Appellee.

VOLUME IV.

(Pages 961 to 1239, Inclusive.)

Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

(Deposition of T. F. Ryan.)

Q. Now if things had continued in Mexico as they were in 1910 and 1911, and they had peace, what in your opinion would have been the value of that property today?

Mr. RIDER.—I object to that as irrelevant, immaterial and incompetent, and as purely speculative and based upon a condition which does not exist.

A. The management figured on four thousand acres of bananas there, and there is no question in my mind but what they would have planted them, in fact we would have planted them ourselves for them and taken the lease if conditions had been such that we could, under the Republic of Mexico. I would say four thousand acres of bananas would [856] be worth three hundred dollars an acre, conservatively. That is my business, growing bananas. Outside of that he would have the balance of his land left, which ought to have materially advanced in value with the development of the plantations. I thing that that land would be conservatively worth a million and a half dollars to-day if the development had been allowed to go on as it started, without the interference of the insurrections.

Q. I will ask you to state whether or not you can fix a value upon the property at the present time?

A. No.

Q. Why not?

A. The condition of the country is such that you cannot fix anything—that would be too speculative to do.

Q. In other words, there is no market for any

(Deposition of T. F. Ryan.)

property down there? A. No.

Q. At the present time, owing to the rebellion and the insurrection—

A. There is nothing safe except what is tied down so that it cannot be pulled up and taken away.

Q. I will ask you to state, if you can, if you were the owner of that property at the present time, what is the least which you would take for it under existing conditions?

Mr. RIDER.—I object to that as irrelevant, immaterial, incompetent and not the proper basis of value.

A. That is a hard question to answer. I probably would be a sport and hold it and not sell it at all. If I owned the property and had to sell it it would probably be [857] worth—I doubt if I could get $75,000 for it.

Q. (Mr. McGINN.) Don't you think, as a matter of fact, that the land itself is worth more than that?

A. The land is worth just as much as it ever was—the value of the land has not been depreciated by these troubles—the land is all there, and if peace ever comes to that country why the land would gradually become worth more money as the Pacific Coast develops, because it is the closest possible point on the Pacific Coast that will produce tropical fruits. You have to go well down to 20 before you can grow tropical fruits, and that is practically on the border.

Q. Are you acquainted with the value of banana land in that country? A. I am.

Q. And you were during the years 1910, 1911?

(Deposition of T. F. Ryan.)

A. Yes,

Q. And you state that while you were not upon this particular land yourself, you have holdings within eighteen miles of it? A. Yes.

Q. You have been there yourself?

A. I have been to San Blas on our own plantation.

Q. I will ask you to examine this document which is marked "Report," and addressed to Mr. F. G. Noyes, receiver, and dated December 26, 1911, which I will ask to be marked as Defendants' Exhibit No. 4 for identification, and I will ask you to state whether that report conforms to the report which was made to you concerning this property. [858]

Mr. RIDER.—That is objected to as irrelevant and immaterial and calling for a conclusion of the witness and as incompetent.

Mr. McGINN.—I mean, that is as to the general nature of the land.

Mr. RIDER.—Is that a copy of the Wells report?

Mr. McGINN.—Yes.

The WITNESS.—(Examining document.) I do not see but what his description is reasonably clear on that.

Q. Do you know how much Captain Barnette paid for property? A. I do not.

Cross-examination.

Q. (Mr. RIDER.) Mr. Ryan, are you one of the parties who at one time held an option on this property. A. No.

Q. Did you ever at any time have an interest in this property?

(Deposition of T. F. Ryan.)

A. Only in the last few months before Captain Barnette asked me to see if we could use some of this fruit up there and if so he wanted to see what we could do in the way of marketing it. I sent a manager from San Francisco down to examine the plantations and I found a great many of them had been washed out. I did spend about three thousand dollars, however, in putting the plantations in shape to take the bananas out and said something about—well, the time was too short and he could not give me any definite answer on the proposition as to what he could do—it seems to me it was December 14.

Q. You refer to the taking of the product off the plantation? [859]

A. To the taking of the product off the plantation.

Q. And that is the extent of your interest in it?

A. That is the extent of my interest in it.

Q. You never had any interest in the plantation itself? A. No interest at all.

Q. And you have no interest at this time?

A. No interest at this time; in fact we had to abandon what we spent there because we could not get the fruit out.

Q. On account of the insurrection?

A. On account of the insurrection.

Q. And you say you have never been on this ranch yourself?

A. No. I have my southern manager and he looks after all that.

Q. I am asking you about your own personal acquaintance with it. A. No, sir.

(Deposition of T. F. Ryan.)

Q. And your own property is eighteen miles from this property. A. Approximately.

Q. That is the nearest you have ever been to the Barnette property? A. I have been at San Blas.

Q. And how near is that?

A. I should say about fifteen miles, I can't say positively as to that.

Q. Your entire information then respecting the condition and character of this property is based upon reports made to you by your managers?

A. By my tropical manager who reports to me on all our land, [860] and I buy on his reports in preference to my own judgment.

Q. Is he in this city now? A. No.

Q. Where is he now?

A. One of them is in San Francisco and the other is at the plantation now managing it.

Q. Now, were you acquainted with the condition of this property in 1910 and 1911? A. Yes, sir.

Q. Did you have it examined at that time?

A. Well, my manager examined that property and reported it to me.

Q. In 1910 and 1911?

A. Well, it was 1909 or 1910.

Q. 1909 or 1910?

A. Yes, sir, and he wanted at that time to interest me in the property.

Q. Now, at that time there was a state or a condition of peace in Mexico.

A. Peace in Mexico.

Q. When did the insurrection start, the Madero in-

(Deposition of T. F. Ryan.)

surrection, do you remember?

A. I don't remember, that is a matter of public record, however, some time in 1911, I think.

Q. This property is covered by a tropical growth of vegetation, is it not?

A. What has not been cleared by Captain Barnette, or that was cleared at the time.

Q. Do you know whether or not any of that that was cleared at the time Captain Barnette became interested in it, or **[861]** was subsequently cleared by him, has returned to its original state?

A. There is a light growth of underbrush that will come up in three months down there.

Q. Yes.

A. I know they have kept it down, and the banana plantations were reset personally at my own expense, all of the plantations; it was in the condition that this gentleman said—the stock was turned in there, and we straightened it up and reset it into bananas.

Q. By "this gentlemen," do you mean Mr. Wells?

A. Yes. We replenished it and put the banana plantation back in shape.

Q. How many acres are there in the banana plantation?

A. I don't believe there is over 250 acres now, because some of it was low and was badly grown up with undergrowth and it was cheaper to set out a new plantation.

Q. What is the nature of that undergrowth which grew up there?

(Deposition of T. F. Ryan.)

A. Everything that ever grew there in the first place.

Q. Tongos, choke-vines, trees and shrubs.

A. Yes—you might cut a tree down there and it shoots right up again.

Q. And how large are some of those trees?

A. It is a light growth, most of them is undergrowth, just light.

Q. And what does it cost to clear it up?

A. Well, it would be only a guess? I imagine the original cost would probably be ten or twelve dollars an acre.

Q. Gold? [862]

A. Gold, but maybe more if it was heavy timber; the second growth would not cost so much, perhaps half of it or maybe less. It grows right back again in three months; you have to keep it down all the time.

Q. Do you know whether there is anybody in charge of this plantation keeping it up now or not?

A. There has not been in the last few months, because they have been driven off by the insurrectos; in fact they have taken possession of it.

Q. The insurrectos have taken possession of the property? A. Taken possession of it.

Q. Claiming a forfeiture of it?

A. I have one report from down there that it was not the insurrectos—that it was a bunch of bandits that took possession. Owing to the squabble between the federalists and the constitutionalists they were unable to police the country and the bandits took ad-

(Deposition of T. F. Ryan.)

vantage of it and they started to kill the sheep on the place and to kill the cattle and steal them and in fact my manager reported to me at one time,—he said it took wings; and that when he wanted a receipt from those fellows for any cattle they had taken off the place, they sent word back to him that if they sent word any more to them again like that they need not expect to see the messenger any more.

Q. And those insurrectos are in possession of that place now?

A. Practically in possession of the place now as I understand it from my last report.

Q. Do you know whether those parties who are in possession of this ranch are operating with either the federalists [863] or the constitutionalists?

A. I understand not with either one.

Q. That they are acting independently?

A. Although recently the insurrectos were the ones that were causing the trouble, the constitutionalists came in and they seemed to enjoy the same privilege that the other fellows did—they helped themselves to the saddle horses and the stock.

Q. And on account of that condition you say that this property has practically no market value at all at this time?

A. Well, I don't know that anybody would even want to go in there and stay.

Q. You don't think anyone would want even to risk a dollar or want to risk their lives to go down there and look at it right now? A. I do not.

Q. Did your investigation which you conducted

(Deposition of T. F. Ryan.)

through your agents and managers, advise you as to the condition of the buildings on these premises?

A. Yes.

Q. They reported them in a state of decay?

A. I don't understand it so. I thought the buildings were all in good condition.

Q. Did they report any of them as being incomplete?

A. I have got that report in my office and I cannot call it to memory.

Q. You know yourself nothing about the condition then of those buildings that were on there?

A. No, I do not. [864]

Q. Or the improvements in general that were put on.

A. The improvements were all very, very substantial and good.

Q. Do you know whether or not those improvements which were originally contemplated were completed or not?

A. I think they were; I think there was in the neighborhood of $150,000 spent on the plantation in one way and another, if not $200,000.

Q. It might be spent there, but you do not know whether they completed the improvements or not.

A. They completed the buildings.

Q. Do you know whether they completed the lighting plant or not?

A. I think the electric light plant was completed.

Q. Your information is that it was completed?

A. Yes. The ice plant was not. There was an ice

(Deposition of T. F. Ryan.)

plant down there that was not set up.

Q. Was your information sufficient to enable you to advise yourself as to what became of the machinery which was imported there? A. It is there.

Q. In what condition—I mean just the general condition, I do not care for it specifically?

A. I think I have got the facts here (refers to document). It is in fair condition as it could be under the circumstances of being subject to the tropical rains and so forth. Of course there is a world of lumber there.

Q. That machinery is allowed to stand out in the open?

A. It is covered, most of it, and cared for.

Q. It is rusty and depreciated in value, is it not?

A. No more so up until just recently until the insurrectos [865] have got there, the property has been reasonably well cared for.

Q. Do you know whether they have destroyed any of the machinery?

A. I understand they have taken practically everything, up to the barbed-wire fences—anything that has any value.

Q. Anything that is movable on the ranch is taken off?

A. A great deal of it; that is my understanding of it.

Q. And in order to restore that ranch, it would be necessary to restore all that machinery and stuff, wouldn't it?

A. Well, I cannot answer that, because they may

(Deposition of T. F. Ryan.)

have had machinery there which was—well, it depends on the nature of the development entirely. If a man wanted to grow one kind of product he might have one kind of machinery and if he wanted to grow another product he might require another kind of machinery, and it depends altogether on his development—what he could have to raise there.

Q. If he wants any machinery there he would have to put it in there—to put in a new supply of it entirely, wouldn't he?

A. The chances are he will after they get through with it down there. It is just problematical as to what they need. In September of this year there was eighty-six brood mares—if you want the list—

Q. I don't care for that.

A. I will show you—practically twelve or fourteen hundred head of stock on the place. This is taken from this gentleman's report. There is more stock on the premises than he found when he went down there.

Q. The report of your investigators, then, is different from [866] that of Mr. Wells.

A. My investigations were in the nature of an inventory.

Q. The report of your investigators is different, as to the property on the ranch, than that of the Wells report which you just examined, is it?

A. Yes; the Wells report, as I see it there, is an estimate, and mine is the actual inventory, except as to the cattle—those they could not round up and count unless it would take months.

(Deposition of T. F. Ryan.)

Q. Does your information advise you in any way as to the taking of cattle and stock generally on this ranch by the Mexican government in payment of its claims against the property for taxes? A. No.

Q. Or the taking of any of this property, or a claim of ownership upon it, by persons having claims against the ranch?

A. No. As I understand it the ranch has always had plenty of money to take care of all its obligations.

Q. That is your information?

A. That is my information. Not only that, but when we went down there in September there were no obligations against the place that I know of, and there was money enough on hand to take care of it. I understand Captain Barnette has kept money enough there to take care of all its obligations; that there was never a time that it lacked for money to take full and proper care of the place.

Q. Do you know of a claim being asserted against that property by the manager himself?

A. No. [867]

Q. You agents did not advise you respecting anything of that character? A. No.

Q. Now, you say that if peaceful conditions had obtained in Mexico from the time Captain Barnette acquired this property down to the present time, and the plans which you understand he had for the improvement of the property had been carried out, you think that property now would be worth a million and a half.

A. I think it would be conservatively worth a mil-

(Deposition of T. F. Ryan.)

lion and a half if he had carried out his plans in regard to the bananas alone, to say nothing about the rest.

Q. How much would it have cost him to carry out those plans—what investment would it have required?

A. A very comparatively small investment. His original investments made all the preparations so that the ranch would be practically developing itself with very little improvement from 1911 on. He laid the foundation for all of those improvements and they would have taken care of themselves, practically, and the banana plantation would have doubled six times in the last four years—the product from the plantations would have paid all the operating expenses and the improvements. If conditions had remained normal down there I see no reason why the management could not have developed and brought the property up to this stage of development with the expenditure of a very little more money, if any.

Redirect Examination.

Q. (Mr. McGINN.) How long were you at San Blas? [868]

A. I have been there on several occasions, anywhere from, I should say, four or five days to two or three weeks.

Q. I will ask you to state whether or not during the time that you were there you ascertained the values of plantation land within a radius of thirty or forty miles from San Blas?

(Deposition of T. F. Ryan.)

A. I did. I had two men on the coast for the greater portion of sixteen months and riding horseback clear down to Salinas Cruz.

Q. And you talked yourself with people at San Blas about the value of the property? A. Yes.

Q. And you feel you are acquainted, and were acquainted with the values of property around San Blas in 1910 and 1911?

A. Yes, I do, as well as anybody in that territory, and more, because I had examined it from a critical, practical standpoint to know what was there, while the average casual observer don't pay much attention to it.

Q. And you think you knew the value of this property in 1910 and 1911? A. I do.

(Deposition of witness closed.) [869]

[Defendants' Exhibit No. 3 for Identification, With Deposition of W. H. Parsons.]

STATEMENT W. A. BANK, Sept. 13, 1909.

Loans and Discounts	258,545.35
Overdrafts	12,977.89
Stocks and Securities	59,875.
Building & Real Estate	17,536.23
Furniture & Fixtures	5,245.31
Assay Outfit	2,505.25
" Expense	1,626.96
" Clipping	3,473.75
" Premium	2,317.15
Expense	49,881.64
Gold Dust	221,919.71
" Bullion	6,000.
F. A. Wing	1,367.47
Washington Trust Co	258,734.42

Wells Fargo Nev. Natl. Bank	760,033.43	
Bank of Manhattan Co	2,630.47	
Natl. Bk. of Com. Tacoma	39,985.27	
Puget Sound Natl. Bk	27,134.70	
Seattle Natl. Bk	25,252.67	
Dexter Horton Co	31,275.48	
Can. B. of Com. Seattle	342.21	
Scan. Amer. Bk	327.95	
Can. Bk. of Com. Dawson	3,212.39	
Bk. of B. N. A. "	1,275.99	
Valdez Bk. & Mer. Co	505.29	
Fairbanks Branch	4,106.80	
Fox "	2,013.71	
Cash	345,063.44	
Overs & Shorts	84.88	2,145,250.81

LIABILITIES:

Capital Stock	150,000.	
Und. Profits	6,248.37	
Circulation	94.	
Dividend Acct.	4,500.	
Assay Charges	74,451.07	
Exchange	10,182.25	
Telegrams	377.42	
Interest	27,174.53	
Due Depositors, Individual	1,150,406.43	
Savings	233,423.48	
Demand Certificate of Deposit	159,325.02	
Time " " "	94,167.29	
Cashier Checks	184.31	
Certified "	2,752.98	
Letters of Credit	8,900.	
Insurance	200.29	
Cleary Branch	65,037.92	
Dome "	157,825.45	2,145,250.81

Statement W. A. Bank, Sept. 13, 1909.

Defendants' Exhibit 3 for Indentification. N. W. Bolster, Notary.

[870]

[Defendants' Exhibit No. 4 for Identification, With Deposition of T. F. Ryan.]

REPORT.

Hacienda Canada Del Tabaco, Santiago Ixcuintla,
Tepic, Mexico.

Muskogee, Oklahoma,
December 26th, 1911.

Mr. F. G. Noyes, Receiver,
Washington-Alaska Bank,
Fairbanks, Alaska.

Dear Sir:—

In compliance with your instruction, I made a trip to Tepic, Mexico, to inspect the Hacienda Canada del Tabaco, being the property of Mr. E. T. Barnette, to which you hold a Deed of Trust as receiver of the Washington-Alaska Bank, Fairbanks, Alaska.

I left this city on the 22d day of November and returned on the 20th day of December. I experienced several delays on account of the political conditions of the country. I arrived at Guadalajara at 6 P. M. November 26th, and remained there until the evening of the 30th, on account of the activity of the insurrectors at Tepic, where the insurrectors were in control and liberated 500 government prisoners, who were reported to be carrying on lawless acts on the trail between San Marcos and Tepic, and on the recommendation of American residents at Guadalajara, I remained at that point as stated, to give the federal soldiers opportunity to reach Tepic and regain control, which they readily accomplished. I arrived at Tepic shortly after midnight December

1st, and early on the morning of the 2d I began an investigation of the title of the Canada del Tabaco properties and discovered that I would be unable to secure an abstract to the properties without a power of attorney, duly certified by the Governor of Alaska, and the Mexican consul at Seattle, whose signature must be duly verified by the authorities at Mexico City. In the absence of such authority I realized the necessity of developing the necessary influence to get in touch with the records and other necessary information, which I accomplished after considerable [871] delay. It was necessary to visit the two notary public offices at Tepic, and one notary public at Santiago Ixcuintla. I made a careful search of these records and am convinced that the title is clear and not subject to an attack, and it is so considered by all persons I met that are familiar with the properties, which opinion is concurred in by Attorney Antonia Garcia Esteves, who read the written opinion of Attorney Tomas Andrade, dated March 28th, 1908, and advised me he had personal knowledge of the title during the past 15 years and official knowledge of the title since his appointment as notary public, is a most important office in Mexico.

A certified copy of the abstract can be had as above indicated, at an approximate cost of $175.00 in gold. It is my judgment that there is not any necessity of getting such abstract of title. I am satisfied my search of the records were complete, and if an abstract was had, it would have to be submitted to a Mexican attorney for an opinion. You now have a copy of the opinion of Attorney Andrade and I had

a long conference with Attorney Antonia Garcia Estaves, who made a favorable report and it is my judgment and information that Andrade and Estaves are the leading attorneys of the territory of Tepic, and they have an excellent reputation among the Americans in that country. However, should you desire an abstract of the title, I will be pleased to serve you as you may suggest.

I left Tepic on the morning of December 7th and reached Canada del Tabaco on the 8th and remained there looking over the property until the afternoon of the 9th, and then returned to Tepic and telegraphed you a brief statement; copy of which I am unable to locate at present; however, I stated in the telegram that the title was good and that the properties were being mismanaged.

As a result of my trip to Mexico, I beg to submit the following detailed report of the E. T. Barnette properties: [872]

Name: Hacienda Canada Del Tabaco.

Location: On the right bank of the Santiago River, 15 miles from the postoffice at Santiago Ixcuintla, Territory of Tepic, Mexico.

Distance to nearest points: By wagon-road it is 15 miles to San Blas, a port on the Pacific Coast and 15 miles to Santiago Ixcuintla, a city of about 4,000 inhabitants, 30 miles from a small station on the Southern Pacific Ry. and 55 miles from Tepic, the capital of the Territory of Tepic, a city of something like 20,000 inhabitants. By river to San Blas the distance is estimated to be about 30 miles.

Santiago River: This river is navigable only for very small boats and the only boats used are "Dug Out" canoes, capable of carrying about 400 bushels of corn. It is claimed the river could be made navigable for larger craft at a nominal cost. The channel of the river is not dependable, it changing more or less every year during the rainy season, and to make this stream navigable would be a project too great for a private enterprise of the nature of the investment in the Canada del Tabaco.

Total Area: 18,723 acres.

Topography: Flat with very little undulation; but sufficient to furnish ideal drainage.

Climate: Tropical, with usual coast variations. Heat oppressive in summer, nights cool. Temperature ranges from 60° to 100° Fahr. Rainy season late June to October 1st.

Drainage: During the rainy season months of June, July and August the majority of the land overflows and leaves a fertile deposit. There is not any washing of the soil and the only standing water after the rainy season is in the old river bed, and most of the old river-bed can be cultivated during the dry season.

Soil: The most of the estate is a rich loam soil of good depth.

Water: Abundant all over the estate at a shallow depth. The great majority of the estate is subirrigated.

General Vegetation: Densely tropical, but easily cleared.

Timber: There is sufficient red cedar and hardwood to meet all the requirements of the estate.

Fruits: Since the purchase of this estate by Mr. Barnette, about four hundred acres have been set out to bananas; it is estimated that they produce 7,000 bunches per month, but owing to a lack of transportation their product is absolutely valueless. They are not cultivated or given any care. The rank undergrowth will soon be in control; [873] a vine known as the Choke Vine, very similar to our Morning Glory, but much larger, has many of the banana trees well wound in its control and will soon destroy the trees. Cattle have been turned in to feed on the bananas and many are carried away by the peons in canoes. The only accessible market is at Santiago Ixcuintla, and their total consumption not be worthy of consideration.

Products Marketed: The only products marketed are corn and cattle. The corn finds a ready market in a small way at Santiago Ixcuintla. Some of it is loaded in canoes and taken to San Blas, but the expense of transportation by canoe makes such sales unprofitable. Beef cattle find a ready market at Santiago *E*xcuintla, San Blas and Tepic, and are being marketed to meet current expenses.

Livestock: I am advised by persons in a position to know that there are about 400 head of beef cattle on the place; this could only be verified by a round-up, which I was not in a position to order, but judging from the number I saw grazing I am

of the opinion that 400 could be rounded up. They have a market value of $10.00 gold per head. At the time Mr. Barnette purchased the estate there was about 900 head of beef cattle; since then approximately 500 head have been sold to meet expenses and unless the revenues are increased and the place made self supporting, another 18 months will find the estate without beef cattle. There are 50 head of work-ox, valued at $20.00 gold per head; 60 head of work mules, undersized, valued $37.50 gold per head; 60 head Spanish brood mares, small, value $10.00 gold per head; 40 head saddle horses, valued $30.00 gold per head. A few hogs sufficient only for table supply.

As previously stated, I did not have the advantage of rounding up this stock, and owing to the recent death of Mr. Williams, the ranch foreman, I could not get the authority to make such round-up, as to the number of head of stock on hand; I had to depend on statements of the employees, which I had fairly well verified by an American at Santiago Ixcuintla, who is familiar with this estate, and I might add that it is the opinion of the Americans in that country that cattle have been sold to meet personal obligations and investments that have no connection with the Canada del Tabaco estate. I could not run this feature of the estate's previous management down, but I have a letter advising me of this condition of affairs since my return, and am informed that items showing transactions will

be forthcoming, which I will furnish you soon as the information reaches me in a tangible form.

Cultivated Lands: The very great majority of this estate is subject to cultivation, and can be placed in a good state of cultivation at a very nominal cost, on account of the cheap labor. There is about 4,500 acres of land that has been in cultivation, part of it laid out last year is well covered with a heavy tropical undergrowth, and it will all be in the same condition with the exception of 2,000 acres which have been rented at $1.00 gold per acre, rent collected [874] and applied on the back salary of Mr. Williams, the ranch manager recently deceased. Hence, the gross income of the estate for the present year is $2,000 gold, and that amount has been applied on back salary.

Pasture Lands: There is very little land that could legitimately come under this heading as commonly understood, about all of the land is as previously stated, subject to cultivation, but when not in cultivation the grasses are very prolific and it is superior to any grass land I have ever seen. I do not believe it can be excelled and can only be equalled in the tropics.

Industrial Implements: There are very few industrial implements. The same implements are used to-day as were used centuries ago. They continue to plow with a stick, pulled by oxen with their yoke lashed to the horns with thongs. There are a few small American plows on the estate. I was unable to locate any modern im-

plements with the exception of a few small plows that were well worn.

Vehicles: Two 3¼ inch Bain wagons. One buckboard and a lot of antiquated bull and mule-carts, some with spoke-wheels, a few with solid or nearly solid timber wheels. I presume they must have some local value.

Harness and Saddles: Outside of a lot of plow harness, which is of very small value, there is a good set of harness for a five-mule team, and four or five ox saddles.

Vessels: There are two good gasoline launches. I would judge one of them to be about 16 feet over all and the other about double its length. The small one leaks badly and is partly submerged. Preparations are being made to pump it out and place it in proper repair. Instructions were recently received from G. Edgar Ward of Los Angeles to ascertain if these launches could be raffled away at Santiago *Ex*cuintla. Mr. Ward directs the management of the estate from Los Angeles, California, by correspondence, and it seems that he has made all the investments, as everything was shipped to the port of San Blas in his name. I can see no possible use for these launches, and very much doubt Capt. Barnette's knowledge of this unnecessary investment as well as other "air-castle" investments that have been made by Mr. Ward.

Buildings: At the time this estate was purchased by Barnette, there was a one-story ranch-house. Since then a second story has been added. The

first story is constructed of masonry, and the second story of red cedar. It is substantial, commodious and ample for all requirements of the estate, which is equipped with electric lights, electric fans and telephones, and there are numerous thatched roof labor quarters close to the ranch-house that are habitable, but of little cash value. Three of them are constructed of lumber and have tile roofs. They are only box buildings about 16 feet square. [875]

A brick building with tile roof, size 30x40, has been constructed for use of a man employed to make brick on the estate for the improvements hereinafter mentioned.

North of the ranch-house elaborate plans have been made for an enclosure of a piece of land, about 200 feet square by a series of brick buildings 38 feet wide. When completed the buildings will have a total length of approximately 600 feet. About 60% of the buildings are completed, no work having been done on the buildings during the 18 months. On the east side of this enclosure is a one-story brick building, 38x200 feet, with corrugated galvanized iron roof divided into six rooms. The north room is filled with parts of ice making machinery and supplies, which cannot be installed on account of missing parts, said to be lost in transit. The second room is the tank-room, where the ice is to be made. Many of the parts, including the iron tank, are installed. The third room is used for the engine-room for the ice plant.

The ice plant has a daily capacity of one ton. The fourth room is the boiler, which furnishes power for the various departments. It is supplied with a 40 horse-power Titcomb boiler. The fifth room is used for the electric light plant, and is furnished with a Nagle high-speed 12 horse-power engine, Westinghouse Electric Generator 10 K. W. style No. 3156–7 C, and a four-circuit switchboard with the usual attachments and tools.

The sixth room is occupied by the blacksmith-shop, machine-ship, feed-mill and wood-working shop in the order named. The blacksmith-shop is furnished with hand and power blast. It has all modern equipment. The machine-shop has a modern 6-foot power lathe, with drilling machine, emery stones and various other attachments used in such a plant. The feed-mill is made up of a small corn-mill and corn-sheller, both operated by power, shafting and pulleys are installed in the entire length of this room.

The woodwork shop has small circular saws, wood lathes, buffing machines and machinery for making tongue and groove flooring. It seems to be capable of turning out large chairs, as a number are in the course of construction. The seventh room is used for a storage room for heavy hardware and lumber. The south side of the enclosure is closed in by the store-house, a brick building 38x140 feet, with tar paper and tile roof, a driveway going between this and the building on the east side. This building con-

tains about 1,800 bushels of corn, 10 miles telephone wire, 5 telephones, 300 sacks of cement, shipped from California over one year ago and now crystallized into rock and worthless, 3 steel windmills, 150 spools galvanized barb wire.

The west side is closed in its entire length by what they call their "Administration Building." It is cut into some 6 or 7 rooms with brick partitions. Rooms partially plastered, but without any roof. The north side is enclosed by brick wall, except the space for driveway. Pillars are partially completed on the interior in front of the Administration Building and the incomplete building on the north side, for the construction of a corridor. In the enclosure there is a cement cistern of 20,000 gallons capacity, and a large elevator water-tank. The framing material used for the roofs of the two completed buildings is California redwood, and just outside of the enclosure I estimate there is 30,000 feet of California redwood of various dimensions. All of this lumber, heavy machinery, cement, windmills and barb wire was shipped [876] from California to San Blas and transported from there by pack-saddle, carts and canoes. When carried by land the distance is 15 miles, by water 30 miles.

It is claimed these buildings represent an investment of $25,000 in gold. If they do, then there must have been an enormous leak.

The machinery investment is claimed to represent $11,000 gold. I can see where the origi-

nal cost of the machinery, import duties, ocean freight and cost of transportation from San Blas would make up such an amount, and now that it is on the ground and everything installed except the ice plant, which is awaiting the arrival of missing parts, the entire investment outside of the store-house adds but little to the commercial value of the property. In addition to the many investments mentioned, the long distance manager, Mr. G. Edgar Ward, of Los Angeles, California, had erected just north of the described brick enclosure, 120 peon houses, size 14x20 feet, and 110 of these houses have tile roof, and the roof extends out 8 feet of their length for porch shade. The remaining 10 houses have thatched roof and the walls are made from limbs and palm, all without floors, and none of them have ever been occupied.

At the east and west ends of the estate, there are small settlements of peon houses, which have heretofore been ample to care for the help when the 4,000 acres was all in cultivation. These great investments in buildings, machinery, lumber, the setting out of 400 acres in a banana orchard, a bulky product of the ranch without hope of transportation facilities, all stand comparatively without value, and a monument to the incapacity of its management under Mr. G. Edgar Ward.

I am informed that Mr. Barnette has never been on the place since he purchased it, and it is the opinion of those familiar with the management of the

property that Mr. Barnette is without information as to the true conditions of the property, and the manner in which his money has been invested, and after my investigation, I, too, believe he has been falsely advised by a visionary manager.

I understand all the help, including the man in personal charge of the estate, were admonished not to address any communications to any person other than G. Edgar Ward, who seems to have been sole dictator. I learn your Deed of Trust is given subject to a contract between Capt. Barnette and G. Edgar Ward and W. D. Begg, and is not to be of force and effect until November 18, 1914.

The present gross income of the estate is derived from the rent of 2,000 acres of cultivated land, amounting to $2,000.00 gold for [877] the coming year, and this amount has been used in payment of the back salary of one man. There is one white man in charge of the place since Mr. Williams' death, who has been on the pay-roll for a couple of years as a machinist. A number of peons are at work. Taxes falling due every 60 days, and these expenses are being met by the sale of beef cattle,—400 head remaining valued at $4,000 gold. As soon as the value of the cattle is exhausted, then the balance of the live-stock must be sold to meet current expenses, and as I view matters, all of these chattels will be exhausted by the close of the coming year, and what the place runs behind in 1913 and 1914 will be chargeable to the real estate. The property waste will continue, unless it is more intelligently handled.

I understand that the only outstanding indebted-

ness is a claim of $1,500.00 gold that the administrator of the estate of George Williams, deceased, has for services of Mr. Williams, while in charge of the properties, all other claims, including taxes being paid, excepting such claims as Ward and Begg and others may have under the Ward and Begg contract.

There is not any demand for the land in Mexico, and I do not believe anyone there is in touch with prospective buyers. The local real estate dealers get into court whenever a sale is made, claiming their commission. I would, therefore, recommend against communicating with them as to the sale of this property.

Political conditions are improving rapidly, and it is my judgment that this property can be sold in California at a price greatly in advance of the price paid by Barnette. The Mormon Church of Salt Lake City, Utah, are anxious to get hold of large fertile estates, and have men down there looking for just such property. The Peoples Trust Company of New Westminster, B. C., has a representative there looking for similar propositions, and they would like to be advised as to the purchase price, if the property can be sold in the near future. [878]

I trust there are not any important items omitted in this report, and that it covers the ground, but should you desire additional information, I am at your command.

Enclosed you will please find newspaper showing political conditions as I found them at Tepic and vicinity. Also, a rough sketch of the map of Canada del Tabaco, from a recent survey, and a photo-

graph of ox team and cart, which will show you the prevailing mode of transportation.

Respectfully submitted,

_____.

Defendants' Exhibit 4 for Identification. N. W. Bolster, Notary. **[879]**

[Defendants' Exhibit No. 5 for Identification, With Deposition of M. W. Peterson.]

March 18, 1908.

Fairbanks Banking Co.,
Fairbanks, Alaska.

Gentlemen:—

We duly received your telegram of the 14th inst. as follows:—

> "Please advise by telegraph at the earliest possibility last reliable report of valuation Gold Bar property. What is the opinion of yourselves regarding property? Wood will explain what we mean by Gold Bar property."

On receipt of your telegram we immediately secured what information we could concerning the Gold Bar Lumber Co., including a statement made by that company dated Oct. 12/07. We later secured from Mr. Armstrong, Manager and Treasurer of the company, an itemized statement of Mar. 1st/08, together with a copy of the company's trial balance of that date.

We have made a careful examination of the statement, and taking it for granted that the figures in the statement are approximately correct, we have arrived at the conclusion that the company is in excel-

lent financial condition considering the present financial and business conditions prevailing throughout the country. After eliminating all resources with the exception of camp equipment, lumber and logs on hand, mill plant, cash, real estate, merchandise in store and accounts receivable, and with these above-mentioned resources conservatively reduced in amount, and estimating the timber of the company worth $300,000, we find that for the purpose of arriving at a basis on which a credit for the company could be figured, it has total resources of $450,000.00 against liabilities of $75,000.00 showing a net worth of $375,00.00. This, of course, is not the figure at which the property would be valued in the event of a sale, but is merely the valuation that we as Bankers would give the property were we considering a loan on it.

According to the statement furnished us by Mr. Armstrong, the gross resources of the company amount to $526,000.00, which we believe to be a conservative valuation as we are informed that a reasonable amount is charged off each year for depreciation. We have therefore telegraphed to you as follows:—

> "In reply to your telegram of Saturday, property is worth in our opinion $375,000.00 for a firm basis of credit. Believe it can be sold for more than $425,000.00. Opinion is based upon statement March 1st and independent investigation."

We do not know for what purpose our opinion on this property is wanted, but we have been as fair as

possible in making the above estimates, and trust that our opinion will be of some service.

Yours very truly,

Cashier.

Nov. 24, 1914.

Received the original of which this is a copy.

S. F. RATHBUN.

Defendants' Exhibit 5 for Identification. N. W. Bolster, Notary. [880]

[Defendants' Exhibit No. 6 for Identification, With Deposition of M. W. Peterson.]

All Agreements Contingent upon Strikes, Accidents, Car Shortage and other Causes of Delay Beyond Our Control. Quotations Subject to Change Without Notice.

E. T. Barnette,
President.
Carl M. Johanson,
Vice-President.

A. T. Armstrong,
Treasurer and Manager.
J. S. Mackenzie,
Secretary.

GOLD BAR LUMBER CO.

Manufacturers and Wholesalers of

FIR AND CEDAR LUMBER, LATH, SHINGLES, BRIDGE, RAILROAD TIMBERS AND CAR STOCK.

Mills at Gold Bar, Wash., on main line of Great Northern Railway.

General Offices:
433 Henry Building.
Telecode
Western Union Code.

Seattle, Washington, Oct. 13, 1913.

Mr. W. H. Parsons,
Seattle, Wash.

Dear Sir:—

Enclosed find the general report of operation at the

mill for September. While the profits show small, I think it is fairly good considering the present condition of the lumber market. The extension of our logging railroad has cost us considerable money the last two months, but it had to be done before the bad weather set in, in order to get the best results for the least money, but from now on, we will not have this drain on us and will be able to reduce our bank obligation still further—the present month, the 30th of September was our yearly date for closing books for the preceding year, and we charged off the bad accounts and depreciated some of the items in order to be within a reasonable figure of their actual worth. The depreciation was something like $40,000, and I enclose statement of resources and liabilities after the depreciation has been made. The only item showing an undervaluation is the timber, which on the old cruise shows a little over 72 millions, but as our old cruise has over-run about 15% we undoubtedly have about 80 to 85 million feet of standing timber left.

Yours very truly,

CARL M. JOHANSON.

Oct. 29, 1913.

Defendants' Exhibit 6 for Identification. N. W. Bolster, Notary. [881]

[Defendants' Exhibit No. 7 for Identification, With Deposition of M. W. Peterson.]

GENERAL REPORT—GOLD BAR LUMBER COMPANY—SEPTEMBER, 1913.

SAWMILL.

Labor	$6929.61		
Mdse.	727.46	$7657.07	
Output	1877667'		
Hrs. run	201½		
Ave. per hr.	9318		
Cost per M.	$4.36		

SHINGLE-MILL.

Labor	338.50		
Mdse.	1.69	340.19	
Output	593 M		
Cost	57¢		

LATH-MILL.

Not operated.

LOGGING CAMP.

Labor	6879.15		
Mdse.	1400.19	8279.34	
Cost per M.	$4.07		

COOK HOUSE.

Loss		72.57	

GENERAL.

Salaries	800.00		
Fire Ins.	214.00		
Liability	401.50		
Taxes	330.00		
Interest	204.00		
Discount	334.13		
Gen. Expense	194.31		
Depreciation	1000.00	3477.94	
Total O/H charges @ 1.85			
Stumpage 2034418 @ 2.00		4068.84	

LUMBER SALES.

Rail 56 cars	1105051'	@	$10.90		$12047.12
Shgls.	308500	@	1.55		490.32
Local	95143'	@	11.61		1103.79
" Shgls.	83000	@	1.92		159.56
Wood, etc.					394.78
More lbr. cut than sold	772,616	@	10.50		8112.47
More timber logged than sawed	156,751	@	6.00		940.51
More shgls. cut than sold	84,500	@	.50		42.25
Underweights					1094.97
				$23895.95	$24385.77
GAIN				489.82	
				$24385.77	$24385.77

Rents	$ 69.00
Water	240.00
Lights	256.48
	$565.48

[882]

GOLD BAR LUMBER CO.

SEPTEMBER 30, 1913.

RESOURCES AND LIABILITIES.

RESOURCES.		
Accounts Receivable	$ 18 271.85	
Cook House Supplies	1 500.10	
Camp Expense Supplies	1 978.09	
Camp Equipment	42 000.00	
Unexpired Insurance	983.00	
Lands	2 240.72	
Lumber Inventory	26 906.80	
Mill Site	5 000.00	
Mill Buildings	39 133.31	
Mill Equipment	60 181.35	
Mill Expense Supplies	1 214.65	
Bank	3 373.58	
Office Furniture & Fixtures	892.16	
Real Estate	11 163.17	
Real Estate Contracts	7 284.23	
Supplies in Warehouse	688.24	
Timber	144 895.81	
Water System	6 000.00	
Valley Supply Co	14 482.80	
TOTAL RESOURCES		$ 388 189.86
LIABILITIES.		
Bills Payable	$ 35,000.00	
Wages Due	6 509.74	
Unpaid Taxes	1 254.00	
Hospital Fees	184.20	
Mackenzie J. S. Salary	300.00	
TOTAL LIABILITIES		$ 43 247.94
NET RESOURCES SEPTEMBER 30, 1913		$ 344 941.92

STATEMENT—GOLD BAR LUMBER CO.

ASSETS:

Bills Receivable	350.00	
Camp Equipment	35 503.18	
Cash	620.71	
Cook House Supplies	149.95	
Camp Supplies	1 207.74	
Excess Freight Fund	592.86	
Horses and Wagons	283.06	
Unexpired Insurance on Mill	3 551.54	
" " on Real Estate	154.02	
Lands	3 290.57	
Lumber & Logs	52 600.33	
Mill Site	5 000.00	
Mill Bldgs.	27 507.94	
Mill Equipment	89 251.36	
Mill Supplies	965.57	
National Bank of Commerce	1 249.43	
Furniture & Fixtures	718.58	
Real Estate	23 550.00	
Valley Supply Co	12 051.99	
Water System	10 341.59	
Timber	271 032.73	
Accounts Receivable	20 878.87	560 852.02

TOTAL RESOURCES.

LIABILITIES:

Bills Payable	100 000.00	
Liability Insurance	839.40	
Accrued Interest	805.17	
Unpaid Taxes	1 000.08	
Accounts Payable	11 082.49	
Wages Due	8 370.27	122 097.41

TOTAL LIABILITIES..... $438 754.61

Nov. 24, 1912.

Received the original of which this is a copy.

S. F. RATHBUN.

Defendants' Exhibit 7 for Identification. N. W. Bolster, Notary.

[884]

[Defendants' Exhibit No. 8 for Identification, With Deposition of M. W. Peterson.]

GOLD BAR LUMBER CO.

STATEMENT OCTOBER 1st, 1910.

RESOURCES:

Bills Receivable	350.00	
Camp Equipment	52 314.46	
Cash	441.60	
Cook House Supplies	293.50	
Camp Supplies	2 751.08	
Freight Deposit	75.00	
Horses & Wagons	133.06	
Insurance on Real Estate	234.89	
Insurance on Mill	2 856.23	
Lands	3 142.87	
Lumber & Logs	59 290.00	
Mill Site	5 000.00	
Mill Bldgs.	47 925.90	
Mill Equipment	74 604.78	
Mill Supplies	1 237.78	
National Bank of Commerce	7 514.98	
Furniture & Fixtures	1 143.98	
Petty Cash	15.59	
Real Estate	23 150.00	
Timber	230 389.95	
Valley Supply Co.	10 539.03	
Water System	10 341.59	
Accounts Receivable	32 584.70	
TOTAL RESOURCES		566 330.97

LIABILITIES.

Bills Payable	99 400.00	
Unpaid Taxes	1 177.71	
Unpaid Interest	910.33	
Wages Due	9 554.19	
Accounts Payable	5 817.33	
TOTAL LIABILITIES		116 859.56
NET RESOURCES		449 471.41

Nov. 24 1913.

Received the original of which this is a copy.

S. F. RATHBUN.

Defendants' Exhibit 8 for Identification. N. W. Bolster, Notary. [885]

[Defendants' Exhibit No. 9 for Identification, With Deposition of J. S. Mackenzie.]

STATEMENT OF GOLD BAR LUMBER CO.

OCTOBER 1, 1908.

RESOURCES.

Camp Equipment	31 915.23	
Excess Freight Fund	625.16	
Horses & Wagons	501.06	
Unexpired Ins. on Mill	2 026.68	
" " " Real Estate	128.78	
Lands	3 229.57	
Lumber and Logs	8 232.74	
Light Equipment	2 879.32	
Mill Site	5 000.00	
Mill Buildings	24 213.87	
Mill Equipment	73 594.81	
Northern Bank & Trust Co	6 519.20	
Office Furniture	548.58	
Timber	300 000.00	
Real Estate	24 500.00	
Valley Supply Co. Stock	9 593.39	
Water System	10 313.82	
Accounts Receivable	7 161.47	
Total Resources		510 983.68

LIABILITIES.

Bills Payable	71 000.00	
Unpaid Taxes	1 306.24	
Wages Due	149.99	
Accounts Payable	362.74	
Total Liabilities		72 818.97
Net Resources Oct. 1, 1908		438 164.71

Defendants' Exhibit 9. N. W. Bolster, Notary. [886]

[Defendants' Exhibit No. 10 for Identification, With Deposition of J. S. Mackenzie.]

STATEMENT.

GOLD BAR LUMBER CO.

ASSETS.

Bills Receivable	350.00	
Camp Equipment	35 503.18	
Cash	620.71	
Cook House Supplies	149.95	
Camp Supplies	1 207.74	
Excess Freight Fund	592.86	
Horses & Wagons	283.06	
Unexpired Insurance on Mill	3 551.54	
" " Real Estate	154.02	
Lands	3 290.57	
Lumber & Logs	52 600.33	
Mill Site	5 000.00	
Mill Buildings	27 507.94	
Mill Equipment	89 251.36	
Mill Supplies	965.57	
National Bank of Commerce	1 249.43	
Furniture & Fixtures	718.58	
Real Estate	23 550.00	
Valley Supply Co	12 051.99	
Water System	10 341.59	
Timber	271 032.73	
Accounts Receivable	20 878.87	
Total Resources		$560 852.02

LIABILITIES.

Bills Payable	100 000.00	
Liability Insurance	839.40	
Accrued Interest	805.17	
Unpaid Taxes	1 000.08	
Accounts Payable	11 082.49	
Wages Due	8 370.27	
Total Liabilities		122 097.41
Net Resources, Oct. 1st, 1909		$438 754.61

Defendants' Exhibit 10. N. W. Bolster. [887]

[Defendants' Exhibit No. 11 for Identification, With Deposition of J. S. Mackenzie.]

GOLD BAR LUMBER COMPANY.

STATEMENT OCTOBER 1ST., 1910.

RESOURCES.

Bills Receivable	350.00	
Camp Equipment	52 314.46	
Cash	441.60	
Cook House Supplies	293.50	
Camp Supplies	2 751.08	
Freight Deposit	75.00	
Horses & Wagons	133.06	
Insurance on Real Estate	234.89	
Insurance on Mill	2 856.23	
Lands	3 142.87	
Lumber & Logs	59 290.00	
Mill Site	5 000.00	
Mill Buildings	47 925.90	
Mill Equipment	74 604.78	
Mill Supplies	1 237.78	
National Bank of Commerce	7 514.98	
Furniture & Fixtures	1 143.98	
Petty Cash	15.59	
Real Estate	23 150.00	
Timber	230 389.95	
Valley Supply Co.	10 539.03	
Water System	10 341.59	
Accounts Receivable	32 584.70	
Total Resources		566 330.97

LIABILITIES.

Bills Payable	99 400.00	
Unpaid Taxes	1 177.71	
Unpaid Interest	910.33	
Wages Due	9 554.19	
Accounts Payable	5 817.33	
		116 859.56
Total Liabilities		
Net Resources		449 471.41

Defendants' Exhibit 11. N. W. Bolster, Notary. [888]

[Plaintiff's Exhibit "D" for Identification, With Deposition of J. S. Mackenzie.]

TIMBER CUT BY THE GOLD BAR LUMBER COMPANY.
YEARS 1908, 1909 AND 1910.

1908—None cut.

1909	January	1,025,369′	1910	446,421′
	February	1,300,613′		874,197′
	March	1,767,587′		1,759,789′
	April	1,716,663′		1,980,951′
	May	1,812,846′		2,469,473′
	June	2,111,573′		2,061,517′
	July	597,644′		1,987,691′
	August	1,208,210′		2,476,338′
	September	1,399,235′		2,399,583′
	October	1,214,593′		2,174,109′
	November	918,357′		2,398,778′
	December	989,180′		1,353,120′
		16,061,870′		21,881,967′

Plaintiff's Exhibit "D." N. W. Bolster, Notary. [889]

[Plaintiff's Exhibits "A" and "B" for Identification, With Deposition of M. W. Peterson.]

Copy of Letter in F. B. Co's file No. 30, Dexter Horton Co.

Seattle, Wash., August 31, 1908.

Fairbanks Banking Co.,
Fairbanks, Alaska.

Gentlemen:—

We have received your telegram of the 27th instant setting forth your requirements in the way of currency for the coming winter. We telegraphed you on the 29th as follows:—

"As an advance against shipment bullion in transit and to be shipped before navigation is closed as per your telegram twenty-seventh will ship two hundred fifty thousand dollars not later than September 5th. Will advise letter concerning Gold Bar Stock."

Since telegraphing you the above, we have received your favor of the 6th instant, going over your present situation quite fully. We are now preparing the currency which we intend to ship during the next few days. We may have some difficulty in providing insurance for so large a shipment, but we can no doubt arrange it.

Referring to that portion of your telegram in which you indicate that you will want us to take as collateral security, the stock owned by you in the Gold Bar Lumber Company; We beg to say that Mr. Spangler, in charge of our credit department will go to Gold Bar sometime this week and make a thorough examination of the mill property and endeavor

to ascertain the exact condition of the company. We can then tell whether we wish to take the stock of the company or not. At the present time the lumber industry is at a standstill—practically no business being transacted.

In regard to the loan which we have made you; We will expect the loan materially reduced if not entirely paid, during the next sixty days. We can then take up the matter of making you the regular spring advance which we understand you have been receiving for some years from your Seattle connections.

We will write you again as soon as we get the shipment of currency started.

Yours truly,

M. W. PETERSON,

Cashier.

Identification "B" to the deposition of M. W. Peterson. N. W. Bolster, Notary. **[890]**

[Plaintiff's Exhibit "C" for Identification, With Deposition of M. W. Peterson.]

COPY.

DEXTER HORTON & CO., BANKERS.

Seattle, Wash., Sept. 4, 1908.

Fairbanks Banking Company,

Fairbanks, Alaska.

Gentlemen:—

We received from you yesterday, your telegram of the 3d instant as follows:

"Upon receipt of certificate of stock Gold Bar

> Lumber Company covering ninety-six shares in our name charge our account and pay E. S. McCord seventy-five thousand dollars for our account of Barnette."

This payment we were not asked to make. Mr. McCord calling upon us and stating that there were some few details to be arranged before the money would be needed.

In the meantime, following instructions contained in your telegram of the 31st ultimo, we shipped on the 2d instant one hundred and twenty-five thousand dollars, and on the 3d instant, one hundred and twenty-five thousand, both shipments being in currency by registered mail. We telegraphed you yesterday as follows:

> "Latest advices you have on the way shipments fifteen sixteen seventeen valued at three hundred seventy-seven thousand dollars. Your account is overdrawn one hundred sixty-five thousand dollars in addition to loan two hundred thousand dollars. Payment has been made on all telegraphic transfers with exception of seventy-five thousand dollars MacCord which payment has been deferred until your shipments fully cover. We cannot advance in excess of shipment of Bullion. Your order has been executed two hundred fifty thousand dollars currency."

In one of your previous telegrams, you asked us what advance we would make against stock of the Gold Bar Lumber Company. We have not yet finished our investigations and have not fully deter-

mined what our course will be, but from present indications, we will be unable to accept the stock, as security, for an advance. Our experience with milling plants has covered quite a broad field and it is our opinion that we should not make an advance against the stock of the Gold Bar Lumber Company, considering the amount of money that company owes and the nature of its holdings.

Referring to the condition of your account with us, we would call your attention to the fact that we are to-day your creditor for three hundred and sixty-five thousand dollars, against which you have gold bullion in transit amounting to about three hundred and seventy-five thousand dollars. We cannot see why we should be called upon to make you a loan in excess of the amount of your bullion in transit. On your side you have treated bullion in transit as a cash credit at this bank and have not hesitated to sell very large telegraphic transfers against them. We wish to be as liberal as possible with all of our customers, but considering present conditions with you and [891] the fact that you have never had a deposit with us and that we have never occupied any position excepting that of advancing you money, we feel that when we have you on our books for the amount which we are now carrying you for, that we are doing all that can be expected. The security which you have deposited with Mr. Griffin as trustee, is an unknown quantity, as far as we are concerned, but we presume that it is good—having been selected by Mr. R. H. Miller, in whose judgment we place great confidence; but this security was subject to withdrawal

and substitution.

As stated in our telegram sent you some time ago, we will only be able to make advances to you against actual shipments of bullion and will not care to make any loans, taking as collateral stocks or your bills receivable.

Trusting that the two shipments which we have just made to you will arrive safely, and trusting that you will be able to secure enough gold-dust for shipment to us to cover what drafts and transfers you are compelled to make upon us, we remain,

Yours truly,

(Sgd.) M. W. PETERSON,

Cashier.

Identification "C" to the Deposition of M. W. Peterson. N. W. Bolster, Notary. **[892]**

State of Washington,
County of King,—ss.

I, N. W. Bolster, a Notary Public in and for the State of Washington, residing at Seattle do hereby certify that the foregoing depositions of the witnesses E. L. Webster, W. H. Parsons, T. F. Ryan, W. M. Peterson, J. S. Mackenzie, and Frank E. Barbour, produced on behalf of the defendants were taken before me, at my office, 707 Lowman building, Seattle, Washington, commencing on the 14th day of March, 1914, and ending on the 16th day of March, 1914, pursuant to the notice for the taking of the depositions of Carl M. Johanson and W. G. Cassels, heretofore taken in the same cause, a copy of which notice is hereto attached, and pursuant to oral stipulation entered into between the attorneys for the re-

spective parties, as appears in the foregoing depositions; that said witnesses, before testifying, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that said depositions, by agreement of the parties, were taken down by me in shorthand and thereafter transcribed into longhand; that the signing of said depositions by said witnesses was by agreement between counsel, expressly waived, it being stipulated and agreed that said depositions are to be used on the trial of said cause with the same force and effect as if signed by said witnesses.

And I further certify that the documents marked as Defendants' Exhibits 3, 4, 5, 6, 7, 8, 9, 10 and 11 and Plaintiff's Exhibit "D" were identified and used in connection with the taking of said depositions, and the same are herewith returned as part thereof, and that certain documents **[893]** identified and used during the cross-examination, were by me marked as "Plaintiff's Exhibits A, B, and C," and returned to and retained by counsel for plaintiff.

IN WITNESS WHEREOF I have hereunto set my hand and fixed my notarial seal this 20th day of March, A. D. 1914.

[Seal] N. W. BOLSTER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Notary's fees $209.00. Paid by defendants.

N. W. BOLSTER,
Notary.

[Endorsed]: Received, Clerk of the Court Office, Apr. 20, 1914, Fairbanks, Alaska. Filed in the Dis-

trict Court, Territory of Alaska, 4th Div. Apr. 20, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy. **[894]**

Mr. RIDER.—At the close of the reading of the deposition, the plaintiff moves to strike it out, for the reason that it is irrelevant, incompetent and immaterial; that the valuations placed thereon, as shown by the witness, are not based upon any knowledge of his own; that he had no knowledge of it, and had never been within 15 miles of the place.

The COURT.—I will consider the motion later, but it seems to me it is clearly incompetent.

[Testimony of R. M. Crawford, for Defendants.]

R. M. CRAWFORD, a witness called for defendants, having been duly sworn, testified as follows:—

Direct Examination.

(By Mr. McGINN.)

Q. What is your name?

A. R. M. Crawford.

Q. Where do you live?

A. In Fairbanks, Alaska.

Q. How long have you lived in Fairbanks?

A. Since 1904.

Q. What has been your business?

A. Real estate and mining broker.

Q. You have been engaged in that business ever since you were in Fairbanks and up to the present time? A. Yes, sir.

Q. Are you acquainted with the values of property in the town of Fairbanks? A. I am.

Q. Are you acquainted with the property situated

(Testimony of R. M. Crawford.)

on Turner Street between First and Second Avenues, which is occupied by Pinska, the Imperial Cigar Store, and the Barnette Building, and the tin shop in between? You know the property known as the Barnette property? A. Yes, sir.

Mr. RIDER.—Is that property described in the trust deed? [895]

Mr. McGINN.—Yes, sir, and the property where the rents have been coming from.

Mr. RIDER.—To which the plaintiff objects as irrelevant and immaterial.

The COURT.—He may answer, subject to the objection.

Mr. McGINN.—Q. What do you consider the fair and reasonable value of that property at the present time ?

A. I should say from twenty to twenty-five thousand.

Q. Are you acquainted with the Barnette residence property? A. I am.

Q. You resided there for a while, did you not?

A. Three years.

Q. State whether or not you are acquainted with the value of that property at the present time.

A. I am.

Q. What would you consider the fair and reasonable conservative value of that property?

A. Thirty-five hundred dollars.

Mr. McGINN.—That is all.

Mr. RIDER.—Stand aside.

[Testimony of H. E. St. George, for Defendants.]

H. E. St. GEORGE, a witness for defendants, after being duly sworn, testified as follows, to wit:

Direct Examination.

By Mr. McGINN.—Q. State your name.

A. H. E. St. George.

Mr. McGINN.—He has already been qualified.

The COURT.—Yes.

Mr. McGINN.—Q. You are acquainted with the property I just described to Mr. Crawford, the Barnette property on the corner of Turner Street between First and Second Avenues? A. Yes, sir.

[896]

Q. Are you acquainted with the value of that property at the present time? A. To some extent.

Mr. RIDER.—The same objection is made to this testimony, as irrelevant, incompetent and immaterial, that was made to Crawford's testimony.

The COURT.—The same ruling. As I understood your pleading (to Mr. McGinn), it was in relation only to the income that had been received that operated as a bar?

Mr. McGINN.—And the property also?

The COURT.—He may answer, subject to the objection.

Mr. McGINN.—Q. What would you consider would be a fair, reasonable and conservative estimate of the value of that property?

A. It is worth at least $20,000, and probably better.

(Testimony of H. E. St. George.)

Q. You would consider it a bargain at $20,000?

A. Yes, I would consider it a bargain at $20,000.

Mr. McGINN.—That is all.

Mr. RIDER.—That is all.

[Testimony of Sidney Stewart, for Defendants (Recalled).]

SIDNEY STEWART, recalled in behalf of defendants, testified:

(By Mr. McGINN.)

Q. Have you the amount that was received from the Dome Creek property?

A. The net amount received from Dome Creek is $5,191.83, and from the Isabelle property on Vault Creek is $4,279.71, and from the city property, including the rentals, and the sale for $2,500 that was made, $21,434.11; or a total of those three items of $31,905.65.

Q. That is the net? A. That is net.

Q. What is the gross? Did you get that? **[897]**

A. The gross on the Dome Creek is $5,673.58, and the expense $481.75; on the Isabelle I have only charged $100 expense for this reason; that the party to whom the expense was paid, was paid in gold-dust. So, from the total amount of gold-dust that I received of him, I paid him in gold-dust, and took his receipt, and entered up the net amount of gold-dust received; and, when I had it assayed I entered up the dollars and cents.

Q. Then, the gross on the city property.

Mr. RIDER.—He didn't give the gross on Vault Creek?

(Testimony of H. E. St. George.)

Mr. McGINN.—He says he can't give the gross on Vault.

A. I handled in it gold-dust, and there was no dollars and cents. It was handled in ounces.

Q. Now, the gross on the town property?

A. I haven't that gross figured up on the town property. There are several pages here to be footed up.

Mr. McGINN.—That is all.

Mr. RIDER.—That is all.

Mr. McGINN.—Mr. Rider, I would like to have you produce the report of the Gold Bar Lumber Company for the year 1913, if you have it, or can find it. [898]

[Testimony of Hugh Dougherty, for Defendants.]

HUGH DOUGHERTY, a witness for defendants, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. McGINN.)

Q. What is your name? A. Hugh Dougherty.

Q. Where do you live?

A. At present on Vault Creek.

Q. How long have you resided on Vault Creek?

A. I went on Vault Creek in December, 1905. [899]

Q. How long have you continued to reside there?

A. Well, continuously up to about three years ago, and intermittently since then.

Q. What is your business? A. Mining.

Q. How long have you followed mining?

(Testimony of Hugh Dougherty.)

A. About sixteen years or more.

Q. In Dawson? A. And this camp.

Q. Are you acquainted with the property known as the Isabelle Association claim on Vault Creek?

A. I am.

Q. When did you first become acquainted with that property?

A. In the early spring of 1906 myself and Tom Carroll sunk the first hole to bedrock and made discovery on the Isabelle.

Q. Have you been acquainted with that property since that time? A. Continuously.

Q. Do you know what that property has produced approximately?

Mr. RIDER.—Is that the property described in the Barnette trust deed?

Mr. McGINN.—Yes.

Mr. RIDER.—We object as irrelevant and immaterial.

Mr. McGINN.—The purpose is to show the value at the present time.

The COURT.—I do not think that is material, but he may answer subject to the objection.

A. I think about five hundred thousand dollars.

Mr. McGINN.—Q. Well, are you acquainted with the value of that property at the present time?

A. Well, in a general way.

Q. I will ask you to state whether it is being operated at the present time. A. It is. [900]

Q. You are pretty well acquainted with the value of property on Vault Creek? A. Oh, yes.

(Testimony of Hugh Dougherty.)

Q. I will ask you to state what in your opinion an undivided three-quarters interest in the Isabelle Association claim is worth at the present time.

A. It would be rather hard to arrive at in a way, because, like all claims on the creeks that have been more or less worked, you never can tell when they are worked out. It might be worked for 10 or 15 years, and it might be worked out in a couple or three or four years. It is hard to arrive at.

Q. But according to your best judgment, with your knowledge of the ground, what would be your judgment of the value of the property?

A. Well, the way it has produced in the past, and the fact that it is still working, I would think it would be a good gamble at ten or fifteen thousand dollars, in a gambling way.

Q. Do you think it would be safely worth $10,000?

A. I would think so.

Mr. McGINN.—You may cross-examine.

Cross-examination.

(By Mr. RIDER.)

Q. When was this Isabelle Group or Isabelle Association opened? A. Do you mean located?

Q. No. When did they begin taking gold out from it?

A. Well, discovery was made about March, 1906, and the following season Joe Conta—(Interrupted).

Q. The beginning of the season of 1907?

A. Yes.

Q. From that time down to this time you think there has been $500,000 taken out of it?

(Testimony of Hugh Dougherty.)

A. Yes, sir. [901]

Q. When was the biggest period of production with reference to the year 1911, was it before or after that time? A. Before that.

Q. The greater portion of the gold that was taken out of there, much the greater portion, was taken out before 1911, was it not? A. I think so.

Q. When you said it would be a good gamble to buy it at from ten to fifteen thousand dollars, did you mean to buy the entire interest or the three-quarters interest?

A. I had reference to this particular interest.

Q. A three-quarters interest? A. Yes, sir.

Q. There is a lay on that property?

A. Yes, sir.

Q. Do you know what the royalty of that lay is?

A. The lay that has been working this winter has been an eighty-five per cent lay.

Q. That is the laymen get 85 per cent?

A. Yes, sir.

Q. And the royalty would be, of course, fifteen per cent? A. Yes.

Q. And the value that you are placing at ten or fifteen thousand dollars would be the value of the royalty on the leasehold?

A. Yes. It might net the purchaser back his money and a reasonable profit.

Q. That creek is pretty well worked out?

A. With reference to that particular part, that is a question, because the Isabelle, while she has produced, I think, in the neighborhood of five hundred

(Testimony of Hugh Dougherty.)

thousand, yet she has not been worked over 1200 feet along the paystreak up and down [902] Vault Creek; so that you would have probably—oh, perhaps more than two-thirds or three-quarters of it yet unworked, even unprospected.

Q. It is unprospected, you say?

A. Well, unprospected to any extent.

Q. What it will produce is purely problematical?

A. Problematical.

Mr. RIDER.—That is all.

[Testimony of Henry Cook, for Defendants.]

HENRY COOK, a witness for defendants, after being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. McGINN.)

Q. What is your name? A. Henry Cook.

Q. What is your business? A. Mining.

Q. How long have you followed mining?

A. Fifteen or sixteen years.

Q. Where have you mined?

A. Here and in Dawson.

Q. Are you acquainted with the Dome Creek Association claim on Dome Creek? A. Yes, sir.

Q. When did you first become acquainted with that property? A. The fall of 1904.

Q. Where have you resided since that time?

A. Well, on Dome until this winter.

Q. Right upon this Dome Creek Association?

A. Yes, sir.

Q. You are one of the owners of that association?

(Testimony of Henry Cook.)

A. Yes. **[903]**

Q. I will ask you to state if you are acquainted with the present value of that property?

A. Well, it has got some value. Oh, it is worth twenty-five or thirty thousand dollars, I should say.

Q. You know there are leases upon the property?

A. Yes, leases.

Q. You mean that it is worth that to the owners, to the lessors?

A. I wouldn't say. Those leases that are on the ground are on a very small percentage.

Q. What are the lives of those leases?

A. They are two years, most of them.

Q. How long have they run ?

A. Some of them—one will be out this summer, and the rest of them are for two years yet.

Q. How long in your opinion will it take to work out that property?

A. It is liable to be worked for three or four years, or four or five years for that matter.

Q. There are tailings upon the ground?

A. Yes, sir.

Q. They are of some value, are they not?

A. Yes, some value. There is a lay on them too.

Q. I will ask you to state whether or not, upon the basis of the lays already granted and given upon this ground, in your opinion you do not believe that that ground will produce to the owners of it at least twenty-five or thirty thousand dollars?

(Plaintiff objects as leading. Sustained.)

(Testimony of Henry Cook.)

Q. How much do you think it will produce to the owners?

A. I think twenty, twenty-five or thirty thousand dollars, that is, in time.

Mr. McGINN.—You may cross-examine. **[904]**

Cross-examination.

(By Mr. RIDER.)

Q. That, however, is just a pure guess?

A. Of course. It is mining.

Q. But it is a guess of a miner of what the property will turn out. Is that what you mean?

A. Yes. It is mining.

Q. What interest do you have in the Dome Creek Association?

A. I own a one-sixth interest in this association.

Q. Do you know what interest Mr. Barnette had?

A. He has one-third.

Q. And the whole property is covered with a lay?

A. Well, no, it is not all covered with leases. There are four lays on it; three lays where they are taking dirt from underground, and another lay on these tailings that was let last winter. Four lays all told on the ground now.

Q. What portion of the entire property do those four lays cover?

A. There is one lay—(Interrupted).

Q. You don't understand me, I think. What proportion of the property is covered by those lays?

A. There is one lay on what is known as 1 below discovery; that is all covered by a lay. And, on 2 below, there is a lay on that. And on 3 below there

(Testimony of Henry Cook.)

is a lay on that. Then there is a lay on 1 and 2 below on the tailings. Then there is some ground upon which there is no lay yet.

Q. What proportion of the ground is covered by those lays?

A. There is probably two-thirds of the ground covered with a lay now.

Q. And the remaining one-third is not prospected?

A. Yes, it has been worked, and there is some ground there of value yet. There were some people talking to me to get a [905] lay the other day.

Q. Do you know what the royalty under those lays is? A. Yes, sir.

Q. What is it?

A. It is twenty per cent on all the ground where they are drifting, and on these tailings it is ten per cent.

Mr. RIDER.—That is all.

Redirect Examination.

(By Mr. McGINN.)

Q. There are dumps out upon the property at the present time?

A. Yes. There are three dumps out there now.

Q. And they are waiting for the running of the water to wash them up? A. Yes.

Mr. McGINN.—That is all.

[Testimony of Ray Brumbaugh, for Defendants.]

RAY BRUMBAUGH, a witness for defendants, after being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is Raymond Brumbaugh?

A. Yes, sir.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You were elected a director of the Fairbanks Banking Company about the 13th day of March, 1909, were you not?

A. The records will show. I couldn't tell you the date.

Q. That is what is alleged in the complaint, and what the records show—about that date?

A. Yes.

Q. When did you put in your resignation?

A. Sometime in July, 1910. **[906]**

Q. Did you leave Fairbanks at that time?

A. Yes.

Q. Where did you go?

A. I went to Iditarod.

Q. How long were you absent?

A. About two years, I think.

Q. During the time that you were a director it is alleged that certain stock was purchased by the bank, and during the period of your directorship the first that is mentioned in the complaint is the stock of Hart & McConnell, 10 shares, supposed to have

(Testimony of Ray Brumbaugh.)

been purchased on June 10, 1909. Did you ever hear of that stock being purchased? A. I did not.

Q. Did you ever hear of the stock of Louis Enstrom and Oscar Enstrom being purchased by the bank? A. I did not.

Q. Did you ever hear of the bank purchasing, or authorizing the purchase of H. B. Parkin's stock?

A. I did not.

Q. Did you ever hear of any authorization, or know of any authorization, to purchase the stock of Alex Cameron? A. I did not.

Q. Did you ever know of the bank purchasing, or authorizing the purchase of, the stock of Edith McCormick, or J. W. McCormick? A. No, sir.

Q. Did you ever know of the purchase by the bank, or hear of it authorizing the purchase of the stock of Francis H. Taylor? A. I did not.

Q. Did you know of the purchase of the stock, or alleged purchase of the stock, of McGowan & Clark?

A. No, sir. [907]

Q. Did you know anything about the purchase, or alleged purchase, of the stock of Horton & Dunham?

A. I did not.

Q. Was there any action taken by the board of directors at any meeting when you were present, or within your knowledge, concerning the purchase of any of that stock? A. No, sir.

Q. Did the board of directors at any meeting when you were present ever authorize the purchase of any of that stock? A. No, sir.

Q. During the time that you were a director of the

(Testimony of Ray Brumbaugh.)

bank, what was your opinion in regard to whether or not the bank was solvent or insolvent?

A. My opinion was that it was solvent, in good condition.

Q. Did you at any time during the time that you were a director believe or have any reason to believe that the bank was insolvent? A. I did not.

Q. You were present, I believe the minutes show, at the time the dividend was declared on April 12, 1910. A. Yes, sir.

Q. Do you remember the circumstances under which that dividend was declared? Do you remember anything about what took place at that meeting?

A. I don't remember particularly, except that a statement of the condition of the bank was read, and a dividend was declared. That was all.

Q. Did you or did you not have confidence in the officers of the bank?

A. I certainly had confidence in the officers of the bank. [908]

Q. Who was the active manager of the bank at that time, of the three banks? A. Mr. Wood.

Q. Was Mr. Wood present at that meeting, if you remember? A. He was.

Q. And what if anything did he do in regard to making a statement in regard to the condition of the banks?

A. Mr. Wood was the person that made the statement in regard to the condition of the banks at that time on which the decision to declare the dividend was taken.

(Testimony of Ray Brumbaugh.)

Q. Did you believe the bank had a right to declare a dividend at that time? A. I certainly did.

Q. Did you have any reason to suspect or think that the bank was not in a position to declare a dividend? A. I had not.

Mr. CLARK.—Take the witness.

Cross-examination.

(By Mr. RIDER.)

Q. There were presented to the bank, during the time you were a member of its board, regular monthly statements showing the condition of the bank, were there not? A. There was.

Q. Those statements were examined and considered by the board? A. Yes. They were.

Q. At the time this dividend was declared, you say that Mr. Wood was present and presented some material to the board. A. He did.

Q. The matter that he presented to the board as the basis of the dividend was the fact that the Washington-Alaska Bank had declared a dividend of $50,000 which had been paid to the Fairbanks Banking Company, was it not? [909]

A. I think it was. I would have to look it up and see.

Q. Don't you remember that that was what was presented? A. I think that is true.

Q. That was called to your attention, was it not, as a member of the board?

A. It is too long ago for me to remember the details.

Q. Don't you remember whether or not the board

(Testimony of Ray Brumbaugh.)

had been advised, that the Washington-Alaska Bank had declared a dividend of $50,000?

A. I think that is the case.

Q. Then the further steps were taken to distribute that by applying $25,000 of it to the stock account, and the remainder to the surplus and undivided profits out of which the dividend was declared?

A. I think that is the idea.

Q. That is what occurred at the time the dividend was declared? That is the discussion that occurred?

A. I don't remember any particular discussion in regard to the matter. It was suggested by Mr. Wood that this be done, and the board carried out the suggestion.

Q. And that transaction was had as we have related it here? A. I think that is the idea.

Mr. RIDER.—That is all.

Mr. CLARK.—That is all.

Mr. McGINN.—I desire now to read in evidence Section 54 of the general incorporation laws of the State of Nevada, being marked Plaintiff's Exhibit "NN." It is headed (Reads): "May Issue Stock for Labor or Real or Personal Property. Sec. 54. Any corporation existing under any law of this State may issue stock for labor done or personal property or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive."

I desire to read from the minutes of the board of directors [910] of the Fairbanks Banking Com-

(Testimony of Ray Brumbaugh.)

pany held November 12, 1909. (Reads):

"Fairbanks, Alaska, November 12, 1909. Regular monthly meeting of the board of directors of the Fairbanks Banking Company was called at the office of the corporation at Fairbanks, Alaska, at 8 P. M. Members present; Dave Yarnell, John Flygar, C. J. Robinson, J. L. McGinn. There being no quorum present, the meeting was adjourned to November 13 at 3 P. M. J. A. Jackson, secretary."

I desire now to read from the minutes of the board of directors of the Fairbanks Banking Company, December 13, 1909. (Reads):

"The regular monthly meeting of the board of directors of the Fairbanks Banking Company was called at the office of the corporation in Fairbanks, Alaska, at 8 P. M. Members present; R. C. Wood, J. A. Jackson. Statement of the three banks of December 11, 1909, was presented. There being no quorum present, the meeting thereupon adjourned. J. A. Jackson, secretary."

I desire to read from the minutes of the meeting of the board of directors of the Fairbanks Banking Company of January 12, 1910. (Reads):

"The regular monthly meeting of the board of directors of the Fairbanks Banking Company was called at the office of the corporation at Fairbanks, Alaska, at 8 P. M. Members present; John L. McGinn, C. J. Robinson, Dave Yarnell, R. C. Wood, and J. A. Jackson. A statement of the three banks of January 11, 1910, was presented and discussed. A letter from the Gold Bar Lumber Company [911]

(Testimony of Ray Brumbaugh.)

under date November 27, 1909, was read and ordered filed, together with the October statement and trial balance. After an informal discussion relative to reducing the rate of interest and of the affairs in general, there being no quorum present, the meeting thereupon adjourned. J. A. Jackson, secretary."

I desire now to read from the minutes of the meeting of the board of directors of the Fairbanks Banking Company. February 14, 1910. (Reads):

"The regular monthly meeting of the board of directors of the Fairbanks Banking Company was called at the office of the corporation at Fairbanks, Alaska, at 8 P. M. Members present; McGinn, Wood, Yarnell, Jackson, Robinson, Brumbaugh. The minutes of the meeting of the board of directors of November 13, 1909, and of the adjourned meeting of December 13, 1909, and January 12, 1910, were read and approved, as read. The statement of the three banks as at the close of business February 11th, 1910, was presented and ordered filed. Letter of the Gold Bar Lumber Company dated December 1, 1909, together with a statement and trial balance for November was ordered filed."

"Minutes of the meeting of the board of directors of the Fairbanks Banking Company, March 12, 1910.

The regular monthly meeting of the board of directors of the Fairbanks Banking Company was called at the office of the corporation in Fairbanks, Alaska, at 8:30 P. M. Members present; J. L. McGinn, D. Yarnell, C. J. Robinson, R. C. Wood, J. A. Jackson.

(Testimony of Ray Brumbaugh.)

After an informal discussion of the affairs in general, and there being no quorum present, the meeting [912] adjourned until April 12, 1910, at 8:30 P. M."

I have read these for this purpose. In all of those meetings there is nothing to show that the directors had any knowledge in regard to this stock that was taken up during those particular periods.

Now, have you got the trust deeds, Mr. Rider?

Mr. RIDER.—I have copies of them.

Mr. McGINN.—They may be read in evidence, and I suppose you want those copies back?

Mr. RIDER.—They are my working copies, but I can get along without them.

Mr. McGINN.—I suppose it will be admitted that they are true and correct copies, and admitted that they were duly executed?

Mr. RIDER.—My understanding is that they are such. There is no question about the execution of them.

Mr. RIDER.—As to the receipt of them, the plaintiff objects as irrelevant and immaterial.

The COURT.—Are they offered for the same purpose that the other papers were yesterday?

Mr. McGINN.—Yes.

The COURT.—That objection is overruled. They may be admitted, subject to the objection.

Deed to Mexican property as Defendants' Exhibit 4, and deed to properties in Alaska as Defendants' Exhibit 5. [913]

[Defendants' Exhibit No. 4—Trust Deed of E. T. Barnette and Isabelle Barnette to Receivers' Property in Alaska.]

THIS TRUST DEED, executed the —— day of March, A. D., 1911, by and between E. T. Barnette and Isabelle Barnette, his wife, of the Town of Fairbanks, in the Territory of Alaska, parties of the first part, and F. W. Hawkins and E. H. Mack, Receivers of the Washington-Alaska Bank, a corporation organized and incorporated under the laws of the State of Nevada, and lately doing a banking business at the said Town of Fairbanks, and their successors in office, of the same place, trustees, parties of the second part, WITNESSETH:

THAT WHEREAS, the Washington-Alaska Bank, a corporation incorporated under the laws of the State of Nevada, and heretofore doing a general banking business in the Town of Fairbanks in the Territory of Alaska, became involved in financial difficulties, and was compelled as a result thereof to close its doors and suspend its general banking business on the 5th day of January, 1911, and at said time was and is now unable to pay in full its depositors and other creditors the owners and holders of unpaid drafts, and the property and assets of the said bank are now in the hands of F. W. Hawkins and E. H. Mack, the second parties, as Receivers, duly appointed by the District Court for the Territory of Alaska, Fourth Division, in that certain action numbered 1597 in the said court entitled "Tanana Valley R. R. Co., a corporation," defendant,

AND WHEREAS, the said E. T. Barnette, for a long time prior to the appointment of said receivers, was and ever since has been and is now, the president and a director of the said Washington-Alaska Bank, and,

WHEREAS, the said Isabelle Barnette, one of the parties of the first part, the wife of the said E. T. Barnette, the other party of the first part, desires to assist her said husband in securing the payment of, and in paying and discharging [914] the obligation of her said husband to the depositors of the said bank, and the owners of unpaid drafts issued by it, and,

WHEREAS, the first parties are informed and believe that the second parties as receivers of the said bank, are about to commence an action in the said court for and on behalf of the creditors of the said Washington-Alaska Bank, against the said E. T. Barnette, one of the first parties, to recover from him the amount of any deficiency that may be ascertained as between the claims of the creditors above mentioned and the amount realized out of the property and assets of the said Washington-Alaska Bank, said action to be based on the liability of the said E. T. Barnette, to said creditors of the said bank, arising out of his management of the affairs thereof, from March, 1908, up to and including January 5th, 1911, as its president, and one of the directors thereof;

NOW, THEREFORE, in consideration of the premises and of the liability of the said E. T. Barnette to the creditors of the said Washington-Alaska Bank, growing out of his connection and manage-

ment of the business affairs thereof as its president and one of the directors during the period of the time last mentioned, and for other good and valuable considerations, the said parties of the first part have granted, and do hereby grant and convey to the parties of the second part and their successors in the office of Receiver of the said Bank, in trust, for the uses and purposes hereinafter specified, all their right, title and interest in and to the following described lands and real estate and the appurtenances thereunto belonging, situate in the Municipality and District of Santiago, Ixcuinita, Territory of Tepic, Republic of Mexico, to wit:

That certain rural property denominated Canada del Tabaco, situate on the right bank of the Santiago River, in the Municipality and District of Santiago, Ixcuinita, Territory of Tepic, which has a superficial extension of seven thousand [915] five hundred and seventy-seven (7,577) hectares, eleven aras, and seventy (70) centaras, there being comprehended in this area two hundred eighty-five (285) hectares, twenty-five (25) aras and ninety (90) centaras, being the superficial area of the island called "La Culebra" which formed part of the Haciendo de Nevarrete, but which was separated from the same and incorporated into the Canada del Tabaco by reason of the change in the course of the Santiago River by a strong flood which it suffered that the lines of the Canada del Tabaco are to the east; the Hacienda of San Lorenza from the Estuary of the Bridge to the monument "del Bule" to the east from this monument to that of "La Paloma" with the

aforesaid Hacienda of San Lorenza, and from the monument lastly referred to, to the River Santiago, with the property denominated "Las Palomas" owned by Don Eduardo Martines Ochoa, and toward the southwest of the Canada del Tabaco is situated, the island named "Los Caballos" and that although this island appears of the plan of said Hacienda it is not embraced in the lands conveyed because it belongs to Senor Don Manuel Lanzagorta.

The landed property alienated is composed of cultivated lands, grazing lands and forest. It has 8 fields fenced with wire. The residence is situated in the island of Culebra, constructed of stone with roof of tile; a warehouse of palm twigs, a roof of thatch in bad condition; stable with roof of thatch. On the Canada del Tabaco there is a storehouse of wooden walls with roof of tile and a warehouse of cedar wood with a roof of tile, all being comprehended on this conveyance, as also the waters, the mountains, and whatever more belongs or can belong of deed or right to the said landed property, containing 18,723 (eighteen thousand seven hundred and twenty-three acres) more or less, according to the English measurement;

TO HAVE AND TO HOLD the said lands and tenements in trust and upon the following terms and conditions, that is to say;

THAT WHEREAS on or about the 18th day of March, 1908, the Fairbanks Banking Co., a corporation, incorporated under [916] the laws of the State of Nevada and authorized to do a banking business in the City of Fairbanks, Territory of Alaska, commenced to transact a general banking business at

said point under their said charter of incorporation, and continuously maintained and operated a bank at said place from the said date until on or about January 5th, 1911; that on or about the 8th day of October, 1910, the name of the said Fairbanks Banking Co. was, under and by virtue of the laws of the State of Nevada, duly changed to that of the Washington-Alaska Bank, its present name, and from that date the business of the said Fairbanks Banking Co. was continued under the name of the Washington-Alaska Bank until its failure as aforesaid; that during all of said period said E. T. Barnette was the president and one of the directors of the said Fairbanks Banking Co., and that said Washington-Alaska Bank, and as such was active and influential in the control and management of its business affairs; that on or about the said 5th day of January, 1911, the said Fairbanks Banking Co., now called Washington-Alaska Bank, became insolvent, and receivers were appointed to take charge of the property and assets thereof in the court and causes above mentioned; that it has at all times since appeared, and is now apparent that there is and will be a large deficiency as between the obligations of the said banking institution to its depositors and the owners of unpaid drafts on the one side, and the proceeds of its property and assets on the other; that by reason of all the premises the said E. T. Barnette has heretofore assumed, and does now assume to take upon himself the obligation of paying the depositors and owners of unpaid drafts of the said banking institution, and their representatives, the second parties herein and their

successors or successor in the office of receivers or receiver, any deficit that may be hereafter ascertained as between the amounts due to such depositors and owners of unpaid drafts, from the said banking institution on the 5th day of January, 1911, together [917] with 6% per annum interest thereon from said date, and the amount realized out of the property and assets of the said bank and paid to such creditors; that the amount of such deficit is not known at this time, and cannot be ascertained at any particular period of time in the near future that can now be named, but will be so ascertained by or before November 18, 1914.

IT IS THEREFORE, understood and agreed between the parties hereto that this conveyance is upon these conditions, that is to say; That the said second parties and their successors or successor are not to take possession of the real property above described, nor the rents, issues and profits thereof, nor have any right to the possession and use thereof at any time prior to November 18, 1914, but if at that date the demands of the depositors and owners of unpaid drafts of the said bank with 6% per cent per annum interest thereon from January 5th, 1911, have not been fully paid and satisfied, either out of the property and assets of the said bank as adminstered by the said receivers, or otherwise, or have not been fully paid and satisfied by the said E. T. Barnette, then the said second parties, their successors or successor, in the office of receivers or receiver, as such trustees or trustee, may take immediate possession of the real property above described, and they are here-

by empowered by the first parties to sell at private sale the whole or the part of said real property then unsold thereof upon the best terms they may be able to secure and make property conveyance of title to the purchaser or purchasers thereof, receive the purchase price and turn the same into the said court, and pay out so much thereof as may be needed to fully liquidate and pay any balance that may remain unpaid of the claims and demands of the depositors and owners of the unpaid drafts of the said bank, said moneys to be disbursed to such creditors under the orders of the said court; and if there be more of the said purchase money than is required to pay and discharge the said balance due [918] to the depositors and owners of unpaid drafts of the said bank, then such overplus shall be returned to the said parties of the first part, and

WHEREAS, on the 18th day of November, A. D. 1909, the said E. T. Barnette, one of the parties of the first part entered into a contract in writing with George Edgar Ward and W. D. Begg, under which the said last-named parties obtained upon conditions named therein the right to secure title to an interest in the above-described real property equal to forty-nine (49) per cent thereof, in which agreement and contract it is provided that they will on or before Nov. 18, 1914, pay to the said E. T. Barnette the several sums of money mentioned therein, viz., One of Two Hundred Thousand Dollars ($200,000) and interest; another of Twenty-six Thousand and Twenty-five Dollars ($26,025.00) and interest, and other contingent sums mentioned in paragraph four of the

said contract, a true copy of the said contract now being on file in said court, in said cause No. 1597, and especially referred to and made a part of this Trust Deed.

NOW, THEREFORE, upon all of the considerations hereinbefore mentioned, if at any time after the delivery hereof and on or prior to Nov. 18, 1914, the said George Edgar Ward and W. D. Beggs, mentioned in the said contract, shall express a willingness to and desire to pay the said E. T. Barnette any part or all of the sums or sum of money mentioned therein, then the parties of the first part do hereby authorize and empower the parties of the second part and their successors to collect and receive from the said Ward and Beggs such payments, and the said Ward and Beggs are hereby authorized to pay the same to the said trustee or trustees herein, such moneys if so paid and received to be disposed of by second parties in the manner above directed for the disposition of the proceeds of the sale of the lands conveyed, providing always that at the time of such payment there [**919**] remains something still due to the said creditors of the said bank.

And the said E. T. Barnette, one of the parties of the first part, does, hereby covenant and agree to and with the said parties of the second part and their successors, that the said property so conveyed, situated in the Republic of Mexico, and is owned by him in fee simple, and is not subject to any lien, mortgage or other incumbrances, contract or agreement of any kind, except the said agreement between the said E. T. Barnette and the said Geo. Edgar Ward and

W. D. Beggs, above referred to.

It is further agreed and understood by all the parties hereto that if at any time after delivery of this trust deed the demands of the depositors and the owners of unpaid drafts of the Washington-Alaska Bank shall be satisfied in full, the parties of the second part will upon demand of the parties of the first part reconvey to them or either of them as they may direct, all the right title and interest of the parties of the second part, and to the said real property then vested in them by virtue of this trust deed.

AND FINALLY IT IS UNDERSTOOD AND AGREED between the parties hereto that if after applying the proceeds of the property and assets of the said Washington-Alaska Bank the amount collected by the second parties from the said George Edgar Ward and W. D. Beggs, if any, and the proceeds of the sale of the real property described above situated in the Republic of Mexico, the same being described in the trust deed of even date, herewith, between the same parties involving the same and the amount or amounts collected and received, if any, by the second parties and their successors from the rents and issues and sale of real property conveyed by this trust deed there should remain a balance yet due to the depositors and owners of unpaid drafts of the said bank, then the said first parties upon the considerations above expressed, do hereby [920] promise to and agree to and with the parties of the second part and their successors to make good such balance or deficiency and pay the same to the second parties upon demand.

THIS TRUST DEED and all the covenants and agreements therein contained shall be binding upon the heirs, executors and administrators of the parties of the first part and the successors of the parties of the second part.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this the —— day of March, A. D. 1911.

Executed in the presence of the following witnesses:

————————————, (LS.)

————————————, (LS.) [921]

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED that on this —— day of March A. D. 1911 before me, the undersigned, Clerk of the District Court for the Fourth Judicial Division of the Territory of Alaska, appeared E. T. Barnette, known to me to be the same individual who signed the within and foregoing trust deed, and then and there acknowledged to me that he executed and signed the within and foregoing instrument in writing freely and voluntarily, upon the considerations and for the uses and purposes therein mentioned and specified.

And at the same time and place personally appeared Isabelle Barnette, known to me to be the wife of the said E. T. Barnette and having been examined by me privily and apart from her said husband and having fully explained to her the nature and the nature and contents thereof, she the said Isabelle Barnette acknowledged to me that she had signed the above and foregoing trust deed and declared that she

had executed the same freely and voluntarily for the purposes and considerations therein expressed, and that she did not wish to retract it.

GIVEN under my hand and seal of office this —— day of March, A. D. 1911.

Clerk of the District Court for the Fourth Judicial Division, Territory of Alaska. [922]

[Defendants' Exhibit No. 5—Trust Deed of E. T. Barnette and Isabelle Barnette to Receivers, Property in Alaska.]

33589 TRUST DEED.

THIS TRUST DEED, executed the 18th day of March, A. D. 1911, by and between E. T. Barnette and Isabelle Barnette, his wife, of the Town of Fairbanks, in the Territory of Alaska, parties of the first part, and F. W. Hawkins and E. H. Mack*m* Receivers of the Washington-Alaska Bank, a corporation organized and incorporated under the laws of the State of Nevada, and lately doing a banking business at the said town of Fairbanks, And their successors in office, of the same place, Trustees, parties of the second part, WITNESSETH:

THAT WHEREAS: The Washington-Alaska Bank, a corporation, incorporated under the laws of the State of Nevada, and heretofore doing a general banking business in the Town of Fairbanks, in the Territory of Alaska, became involved in financial difficulties, and was compelled as a result thereof to close its doors and suspend its general banking busi-

ness on the 5th of January, 1911, and at said time was and is now unable to pay in full its depositors and other creditors the owners and holders of unpaid drafts, and the property and assets of the said bank are now in the hands of F. W. Hawkins and E. H. Mack, the second parties, as receivers, duly appointed by the District Court for the Territory of Alaska, Fourth Division, in that certain action numbered 1597 in the said court, entitled Tanana Valley Railroad Company, a corporation, and John Zug, Plaintiffs, vs. Washington-Alaska Bank, a Corporation, Defendant; and

WHEREAS: The said E. T. Barnette, for a long time prior to the appointment of said receivers was and ever since has been and is now, the president and director of the said Washington-Alaska Bank; and,

WHEREAS, the said Isabelle Barnette, one of the parties of the first part, the wife of the said E. T. Barnette, the other party of the first part, desires to assist her said husband in securing the **[923]** payment of, and in paying and discharging the obligation of her said husband to the depositors of the said bank and the owners of unpaid drafts issued by it; and,

WHEREAS, The first parties are informed and believe that the second parties, as receivers of the said Bank, are about to commence an action in the said court for and on behalf of the creditors of the said Washington-Alaska Bank, against the said E. T. Barnette, one of the first parties, to recover from him the amount of any deficiency that may be ascertained as between the claims of creditors above mentioned

and the amount realized out of the property and assets of the said Washington-Alaska Bank, said action to be based on the liability of the said E. T. Barnette to said creditors of the said bank, arising out of his management of the affairs thereof, from March 1908, up to and including January 5th, 1911, as its president and one of the directors thereof;

NOW, THEREFORE, in consideration of the premises, and of the liability of the said E. T. Barnette to the creditors of the said Washington-Alaska Bank, growing out of his connection with and management of the business affairs thereof as its president and one of the directors during the period of time last mentioned, and for other good and valuable considerations, the said parties of the first part have granted, and do hereby grant and convey to the parties of the second part and their successors in the office of receiver of the said bank, in trust, for the uses and purposes hereinafter specified, all their right, title and interest in and to the following described lands and real estate and the appurtenances thereunto belonging, situate in the Fairbanks Recording District*m* Territory of Alaska, to wit:

An undivided one-half interest in lot five (5) in block four (4) in the incorporated town of Fairbanks, Alaska, according to the official [924] survey of Fairbanks townsite made by L. E. Robe in the year 1909; also That certain lot numbered four (4) in block seventeen (17) in the incorporated town of Fairbanks, Alaska, according to the official survey of Fairbanks townsite made by L. S. Robe, in the year 1909; also

An undivided one-third interest of, in and to that certain Dome Group or association placer mining claim, situate on Dome creek, in the Fairbanks Mining Recording District, Alaska; also

An undivided three fourths interest of, in and to the Isabelle Group or association Placer Mining Claim, situate on Vault creek, in the Fairbanks Mining and Recording District, Alaska.

All that certain lot numbered five (5) in block fourteen (14) in the incorporated town of Fairbanks, Alaska, according to the official survey of Fairbanks townsite made by L. S. Robe in the year 1909;

Also That portion of lot numbered five (5) in block thirty-eight (38) in the incorporated town of Fairbanks, Alaska, beginning at the northeast corner of said lot on Second Avenue; thence extending in a westerly direction along said Second Avenue boundary line of said lot a distance of fifty feet; thence extending in a southerly direction paralell with the easterly boundary line of said lot a distance of about one hundred and forty feet to Third Avenue; thence extending along Third Avenue boundary line of said lot in an easterly direction a distance of about forty-six feet to the southeast corner of said lot; thence extending along the easterly boundary line of said lot in a northerly direction a distance of about one hundred and forty feet to the northeast corner of said lot, the point of beginning.

TO HAVE AND TO HOLD the said lands and tenements in trust, and upon the following terms and conditions, that is to say: [925]

THAT WHEREAS, on or about the 18th day of

March, 1908, the Fairbanks Banking Company, a corporation, incorporated under the laws of the State of Nevada, and authorized to do a banking business in the City of Fairbanks, Territory of Alaska, commenced to transact a general banking business at said point under their said charter of incorporation, and continuously maintained and operated a bank at the said place from the said date until on or about January 5, 1911; that on or about the 8th day of October, 1910, the name of the said Fairbanks Banking Company, was, under and by virtue of the laws of the State of Nevada, duly changed to that of Washington-Alaska Bank, its present name, and from that date the business of the said Fairbanks Banking Company was continued under the name of the Washington-Alaska Bank until its failure as aforesaid; that during all of said period said E. T. Barnette was the president and one of the directors of the said Fairbanks Banking Company and the said Washington-Alaska Bank, and as such was active and influential in the control and management of its business affairs; that on or about the said 5th day of January, 1911, the said Fairbanks Banking Company, now called the Washington-Alaska Bank, became insolvent, and receivers were appointed to take charge of the property and assets thereof in the court, and cause above mentioned; that it has at all times since appeared, and is now apparent, that there is and will be a large deficiency as between the obligations of the said banking institution to its depositors and the owners of unpaid drafts on the one side and the proceeds of its property and assets on the other; that by rea-

son of all of the premises, the said E. T. Barnette has heretofore assumed, and does now assume and take upon himself the obligation to pay the depositors and owners of unpaid drafts of the said banking institution and their representatives, the second parties herein, and their successors or successor in the office of receivers or receiver, any deficit that may hereafter be ascertained [926] as between the amounts due to each depositors and owners of unpaid drafts, from the said Banking institution on the 9th day of January, 1911, together with six per cent per annum interest thereon from said day, and the amount realized out of the property and assets of the said bank and paid to such creditors; that the amount of such deficit is not known at this time, and cannot be ascertained at any particular period of time in the near future that can now be named, but will be so ascertained by or before Novr. 18th, 1914.

IT IS THEREFORE UNDERSTOOD AND AGREED between the parties hereto that the parties of the second part may take immediate possession of all of the real property above described and improvements and appurtenances thereunto belonging; and thereafter continue to manage, control, lease the same if necessary, and collect and receive the rents, issues and profits thereof, and after deducting reasonable charges for collecting the same and the payment of taxes assessed thereon, insurance and other legi*mat*e expenses connected with the management of such property, they shall return to the said court and its receivers the net amount of such rents, issues and profits, the same to be disbursed by the said Court

through its receivers pro rata to the said depositors and the owners of unpaid drafts heretofore issued by, the said bank.

And if at any time after the delivery of this Trust Deed the said trustees and their successors or successor and the said parties of the first part shall deem it more advantageous to sell and dispose of than to hold and retain any of the real property above described, then the same may be sold and conveyed to the purchaser or purchasers by the said trustees and the proceeds derived from such sale or sales shall by the said trustees be delivered to the said Court or its receivers and be disbursed under the orders of the Court pro rata [927] to the said depositors and owners of unpaid drafts; but if it should happen that on the 18th day of November, 1914, the demands of the depositors and owners of unpaid drafts of the said bank, with six per cent per annum interest thereon from Jan. 5, 1911, have not been fully paid and satisfied, either out of the property and assets of the said bamk as administered by the said Receivers or otherwise, or have not been fully paid and satisfied by the said E. T. Barnette, then the said second parties, or their successors or successor in the office of receivers or receiver, as such trustee or trustees may and they are hereby empowered by the first parties to sell at private sale the whole or the part of said real property then unsold upon the best terms that they may be able to secure and make proper conveyance of title to the purchaser or purchasers thereof, receive the purchase price and turn the same unto the said court, and pay out so much thereof as may be needed to fully

liquidate and pay any balance that may remain unpaid of the claims and demands of the depositors and owners of the unpaid drafts of the said bank, said moneys to be disbursed to such creditors under the orders of the said Court; and if there should be more of the said purchase money than would be required to pay and discharge the said balance due to depositors and owners of unpaid drafts of the said bank, then such overplus shall be returned to the said parties of the first part;

And the said parties of the first part, do hereby covenant and agree to and with the said parties of the second part, and their successors, that the said property so conveyed, is of record in their names and is owned by them in fee simple and is not subject to any lien, mortgage or other incumbrance.

It is further agreed and understood by all of the parties hereto that if at any time after the delivery of this Trust Deed, the demands [928] of the depositors and owners of unpaid drafts of the said Washington-Alaska Bank shall be satisfied in full the parties of the second part will upon the demand of the parties of the first part reconvey to them or either of them, as they may direct, all the right, title and interest of the parties of the second part in and to said real property then vested in them by virtue of this Trust Deed.

AND, FINALLY, IT IS UNDERSTOOD AND AGREED between the parties hereto that if, after applying the proceeds of the property and assets of the said Washington-Alaska Bank, the amount collected by the second parties from George Edgar

Ward and W. B. Begg, if any, and the proceeds of a sale of the real property situate in the Republic of Mexico (the same being described in a Trust Deed of even date herewith, between the same parties involving the same subject matter) and the amount or amounts collected and received, if any, by the second parties and their successors from the rents and issues and sale of real property conveyed by this Trust Deed, there should remain a balance yet due to the depositors and owners of unpaid drafts of the said bank, then the said first parties, upon the considerations above expressed, do hereby promise and agree to and with the parties of the second part, and their successors, to make good such balance or deficiency and pay the same to the second parties upon demand.

THIS TRUST DEED and all the covenants and agreements therein contained shall be binding upon the heirs, executors and administrators of the parties of the first part, and the successors of the parties of the second part.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this the 18th day of March, A. D. 1911.

E. T. BARNETTE. (Seal)
ISABELLE BARNETTE. (Seal)

Executed in the presence of the following witnesses:

GEO. F. GATES,
HAROLD C. GREEN. [929]

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED that on this 18th day of

March, A. D. 1911, before me, the undersigned, clerk of the District Court for the Fourth Judicial Division of the Territory of Alaska, personally appeared E. T. Barnette, known to me to be the same individual who signed the within and foregoing Trust Deed, and then and there acknowledged to me that he executed and signed the within and foregoing instrument in writing, freely and voluntarily upon the considerations and for the uses and purposes therein mentioned and specified.

And at the same time and place personally appeared ISABELLE BARNETTE, known to me to be the wife of the said E. T. Barnette, and having been examined by me privily and apart from her said husband, and having fully explained to her the nature and contents thereof, she, the said Isabelle Barnette, acknowledged to me that she had executed the same freely and voluntarily for the purposes and considerations therein expressed, and that she did not wish to retract it.

GIVEN under my hand and seal of office this 18th day of March, A. D. 1911.

[District Court Seal.]

C. C. PAGE,

Clerk of the District Court for the Fourth Judicial Division, Territory of Alaska.

Filed for record March 30, 1911, at 25 min. past 10 A. M., in Vol. 15 Deeds, page 116. John F. Dillon, Recorder. By R. H. Geoghegan, Deputy.

[Testimony of R. C. Wood, for Defendants (Recalled).]

R. C. WOOD, witness for defendants, recalled, testified:

Direct Examination.

By Mr. McGINN.—Q. Did you ever make a computation to determine [930] the amount that had never been paid to the creditors of the Fairbanks Banking Company who were existing upon the 30th day of June, 1908?

A. I made a computation of all the creditors from the 16th of March until, I think, the 1st day of July, 1908, and I find that—(interrupted).

Mr. RIDER.—You were merely asked if you made the computation. A. Yes, I did.

Q. What did you find, as a result of that?

A. Well, including the savings deposits and commercial deposits, there is $4,105.26. Now, I don't think that includes the deposit account of the Scandinavian-American Bank.

Defendants rest.

Mr. RIDER.—I desire to read in evidence the 8th subdivision of Section 9, Article II, entitled "Powers of Directors" of the By-laws of the Fairbanks Banking Company. (Reads:)

"To adopt such rules and regulations for the conduct of their meetings, and the management of the affairs of the corporation as they may deem proper, not inconsistent with the laws of the State of Nevada, or these by-laws."

Now, I wish to read from the General Incorporation Laws of Nevada, Section 7, Subdivision 7.

Mr. RIDER.—(Reads:)

"Every corporation created under the provisions of this Act shall have the power;" Subdivision 7.—"To make by-laws not inconsistent with the Constitution or laws of the United States or of this State, fixing and altering the number of its Directors or Trustees, providing for their election and removal or for the management of its property, for regulation and government of its affairs, and for the certification and transfer of its stock, and to provide suitable penalties for a breach thereof not exceeding $25 in any one case."

In conjunction with this section of the Nevada law which was read in direct evidence, and applicable to the matters interposed as defenses, I want to read Sections 28, 29 and 30 of the Nevada Incorporation Law.

Mr. RIDER.—(Reads Sections 28 and 29 above referred to.) [931]

"Section 28: Payment of Subscribed Capital Stock. The stockholders of any corporation formed under this Act may in the by-laws of the company prescribe the times, manners and amounts in which the payment of the sums subscribed by them respectively shall be made; but in case the same shall not be prescribed, the Trustees or Directors shall have power to demand and call in from the stockholders the sums by them subscribed, at such times and in such manner, payments, or installments, as they may deem proper. The trustees shall also have power at

such times and in such amount, as they may from time to time deem the interest of the corporation to require, to levy and collect assessments upon the capital stock of the corporation, as herein provided, but not upon stock issued as paid up unless so specified and provided in the original certificate or articles of incorporation, which shall not be amended in this respect. Notice of each assessment or call shall be given to the stockholders personally, or by publication once a week for at least four weeks, in some newspaper published in the county in which the principal office or place of business of the company is located, and in a newspaper published in the county wherein the property of the company or corporation is situated if in this State, and if no paper be published in either of such counties, then the newspaper published nearest to the said principal place of business in the State."

"Section 29: Sale for non-payment of calls, etc. If after such notice has been given, any stockholder shall make default in the payment of the call or assessment upon the shares held by him, so many of such shares may be [932] sold as will be necessary for the payment of the call or amount of subscribed capital called in or the assessment upon all the shares held by him, her or them, together with all costs of advertisement and expenses of sale. The sale of said shares shall be made at the office of the company at public auction to the highest bidder, after a notice thereof published for four weeks, as above in this section directed, and a copy of such notice mailed to each delinquent stockholder if his address is known

four weeks before such sale, and at such sale the person who shall pay the call or assessment so due, together with the expenses of advertising and sale, for the smallest number of shares, or portion of a share, as the case may be, shall be deemed the highest bidder." [933]

Mr. RIDER.—(Reads Section 30 of General Incorporation Laws of State of Nevada.)

"Section 30. When Company May But Its Stock. —Every corporation in this State shall also have the power, whenever at any assessment sale of the stock of said corporation or sale for unpaid subscription or call no person will take the stock and pay the assessment, or amount unpaid and due thereon and costs, to purchase such stock and hold the same for the benefit of the corporation. All purchases of its own stock by any corporation in this State which have been previously made at assessment sales whereat outside parties have failed to bid, and which purchases were for the amount of assessments due, and costs or otherwise, shall be held valid and as vesting the legal title to the same in said corporation. The stock so purchased shall be held subject to the control of the remaining stockholders, who may make such disposition of the same as they may deem fit. Whenever any portion of the capital stock of any corporation is held by the said incorporation by purchase or otherwise, a majority of the remaining shares of stock in said corporation shall be held to be a majority of the shares of the stock in said incorporated company, for all purposes of election or voting on any question before a stockholders' meeting." [934]

Mr. RIDER.—I now desire to introduce in evidence statement of the condition of the Washington-Alaska Bank on October 11, 1910, which was identified by the witness Clark as being the statement that was presented to the board of directors at a meeting held—I don't remember the date, but at the meeting referred to in his testimony.

Mr. McGINN.—To which we object as not proper rebuttal evidence.

Mr. CLARK.—And that it is irrelevant, incompetent and immaterial.

The COURT.—Objection overruled. (Marked Plaintiff's Exhibit "RR.")

[Plaintiff's Exhibit "RR"—Statement of Condition of Washington-Alaska Bank, Oct. 11, 1910.]

"Statement of the Condition of the Washington-Alaska Bank on October 11, 1910.

Resources:

Loans and discounts		601165.14
Stocks		417949.00
Real Estate		50820.07
Furniture and Fixtures		4800.00
Cash on Hand:		
Coin	$348647.00	
Dust	44989.99	393636.99
Overdrafts		21343.26
Expenses and Savings Interest		61401.59
Due from Banks		79252.20
		$1630368.25

[935]

Liabilities:

Capital Stock Paid in		169600.00
Deposits:		
Commercial	1084551.17	
Savings	295817.52	1380368.69
Interest Exchange and Undivided Profits		51576.29
Due to Banks		28823.27
		1630368.25"

[Testimony of Sidney Stewart, for Plaintiff (Recalled).]

SIDNEY STEWARD recalled by plaintiff.

Mr. RIDER.—Q. Have you the books of the partnership showing the amount carried on those books to the credit of the depositors Ryan and Yarnell during the month of December, 1907?

A. I have not those books with me of the deposits.

Q. Have you taken from those books that item?

A. I have; yes, sir.

Mr. RIDER.—Q. Whose account have you the book opened to? A. Dan Ryan's.

Q. What was the balance to the credit of Dan Ryan on December 10, 1907? A. $9,769.86.

Q. What was the amount to his credit on December 23d, 1907? A. $9,707.86.

Q. Turn to the Yarnell account. What was the amount to his credit on December 11, 1907?

A. $15,858.86.

Q. And on December 23d?

A. The same amount.

Q. And on December 27th? A. $10,858.86.

Mr. RIDER.—That is all. [936]

(Testimony of Sidney Stewart.)

Cross-examination.

(By Mr. McGINN.)

Q. How much did Dave Yarnell have upon the 30th day of November, 1907? A. 36,050.46.

Mr. RIDER.—That completes the plaintiff's case.

Plaintiff rests.

By Mr. McGINN.—We desire to introduce in evidence Subdivision 4 of Section 7 of the laws of Nevada. (Reads:)

"Every corporation created under the provisions of this Act shall have the power." Subdivision 4—

"To hold, purchase and convey real and personal estate, and to mortgage any such real and personal estate with its franchises; the power to hold real and personal estate except in the case of religious corporations, shall include the power to take the same by devise or bequest in this State or in any other State, Territory or country."

Also subdivision 9, of said section 7. (Reads:)

"To conduct business in this State, other States, the District of Columbia, the Territories, Districts, Dependencies and Colonies of the United States and in foreign countries, and have one or more offices out of this State, and to buy or otherwise obtain, hold, purchase, mortgage and convey real and personal property within or out of this State, to issue its bonds, debentures or other securities and hypothecate its franchises and property of any kind as security therefor."

Testimony closed. [937]

The foregoing, from page 1 to page ——, includes

all the testimony, evidence and exhibits given, offered, admitted and used upon the trial in the above-entitled cause in support of and against the allegations and denials of the amended complaint, answers and replies relative to the subscription for taking over, surrender and cancellation of stock of said Fairbanks Banking Company by the corporation and the directors thereof, except as to the stock of Strandberg Brothers, B. E. Johnson, Emma Strandberg and John L. McGinn; and also all of the testimony, evidence and exhibits given, offered, admitted and used in support of and against the allegations and denials of the amended complaint, answers and replies relative to the declaration of the dividend by the directors of said Fairbanks Banking Company; and the payment thereof; and also all of the testimony, evidence and exhibits given, offered, admitted and used upon the trial of the above-entitled cause in support of and against the further and separate answer and defense of all of the defendants, wherein the said defendants allege and set forth that there was a complete accord and satisfaction of the wrongs and injuries charged in the amended complaint between E. T. Barnette and Isabelle Barnette and the former receivers of said Washington-Alaska Bank, and of the further and separate answer and defense wherein it is alleged that the wrongs charged in the complaint have been fully satisfied and paid by the rents, issued and profits received and derived from the property of the said E. T. Barnette and Isabelle Barnette and of the property deeded by them to said receivers and now in their possession.

That after the plaintiff and defendants had rested, the said cause was argued by the respective attorneys and the same submitted to the Court for consideration and decision, and thereafter and before the findings of fact and conclusions of law had been made and [938] signed by the Court and filed with the clerk thereof, the said defendants requested the Court to make the following Findings of Fact and Conclusions of Law, to wit: [939]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law Requested by Defendants.

BE IT REMEMBERED, That on the 22d day of April, 1914, came on regularly for trial the above-entitled cause; O. L. Rider, Esq., appeared as attorney for the plaintiff, and A. R. Heilig, Esq., and John L. McGinn, Esq., for defendants Wood, Healey, Peoples and McGinn, and Messrs. McGowan & Clark for defendants Jesson, Brumbaugh, Hill, Clark, Preston, Peoples and Healey;

And the Court, after hearing the testimony offered by both plaintiff and defendants, and after the argument of counsel, did, on the 6th day of May, 1914, take said cause under consideration for determination and decision.

And now, on this 22d day of May, 1914, the defendants Peoples, Jesson, Wood, McGinn, Hill, Brumbaugh, Clark, Preston and Healey, before any decision of the Court in writing has been made or filed with the clerk of this court, offer the following find-

ings of fact and conclusions of law, and request the Court to make and sign the same as its findings of fact and conclusions of law, and request the Court to make and sign the same as its findings of fact and conclusions of law in this cause:

FINDINGS OF FACT.

I.

That on the 12th day of December, 1907, owing to the unusual and continuous withdrawal of funds by the depositors of the [940] Fairbanks Banking Company, a copartnership, brought about by a feeling of unrest in financial circles all over the United States as well as in the Tanana Valley, Alaska, the said Fairbanks Banking Company, a copartnership, was compelled to close its doors and suspend business, and a meeting of the depositors and creditors of said bank was immediately called, and, on the 14th day of December, 1907, a committee was selected to investigate and examine into the affairs of said Fairbanks Banking Company, a copartnership, and to report back to the meeting of the depositors and creditors to be held on December 16, 1907. That said committee was thereafter known as the board of directors, after the reopening of said bank.

II.

That said committee so selected consisted of men of high standing in this community for honesty, integrity, and good business judgment.

That said committee, acting according to instructions, and after having obtained expert accountants, proceeded to examine carefully into the affairs of said bank, and, after examining all of the books,

vouchers, documents and other evidence of the affairs of said bank, and after separately scrutinizing all of the notes, mortgages, certificates, and other resources of said bank, made a report to said meeting of depositors on December 16, 1907, of the resources and liabilities of said bank, and in said report declared and stated that the resources of said bank exceeded its liabilities in the sum of $288,579.73. That said committee reported that the net value of the Gold Bar Lumber Company stock, a corporation of the state of Washington, held by said copartnership, was the sum of $341,949.

That said committee, upon an examination of the loans, divided the same into three classes; class number 1 being the class which said committee considered gilt edge, class number 2 [941] being the class which said committee considered perfectly good, and class number 3 being the class which said committee considered might be doubtful; and which said last, or doubtful class, amounted to the sum of $66,235.44, and was eliminated and not considered in arriving at the resources of said Fairbanks Banking Company.

That said committee, at the time of making said report, recommended that the bank continue business, and that, owing to the peculiar financial conditions then existing, it should issue a certain amount of scrip, to be issued by trustees in whose hands a certain amount of the securities were to be placed, to meet the current demands of the depositors; and that thereafter on December 23, 1907, the said copartnership resumed business and such scrip was issued

and was in current use until after the time of the transfer of the partnership business to the corporation. That said committee, after the reopening of said bank, was known as the board of trustees.

III.

That after, and in the fore part of January, 1908, a large number of business, professional and mining men of the Fairbanks Recording District, Alaska, met in the town of Fairbanks, Alaska, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, a partnership, and at said meeting negotiations were begun by said proposed incorporators with said copartnership for the purchase of the same. That at said meeting a committee was appointed to go into the details of the reorganization of the Fairbanks Banking Company, and to report a basis upon which the business should be taken over, two of the members of this committee having been members of the committee of depositors which had in December examined the assets. [942]

IV.

That said committee met on the 5th day of January, 1908, and, after investigating the affairs of the bank, made the following report to be presented for the consideration of the proposed new corporation:

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be

due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

(b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amount subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of $288,000.00 in excess of its liabilities was placed, be accepted.

(e) That all notes, properties, and securities which said board of trustees placed in the No. 3 or doubtful class remain the property of the old institution.

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not [943] later than July 1st, 1908.

(h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without in-

terest for one year, be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the Caustens vs. Barnette suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer and secretary.

(j) That the number of the board of directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30 and December 31.

V.

That said report was, on January 6th, 1908, submitted to said proposed incorporators, and at said meeting the said report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the records of said meeting.

VI.

That at said meeting a subscription list, a copy of which is set forth in paragraph 3 of the amended complaint in this cause, was presented and signed by said proposed incorporators, setting forth the amount for which each respectively subscribed. [944]

VII.

That at said meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that said partnership would turn over to said corporation the property of said Fairbanks Banking Company, a partnership, on the terms specified in said report, and said proposed incorporators in behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of said partnership.

VIII.

That said Fairbanks Banking Company, a corporation, became such on the 21st day of January, 1908. That on the 8th day of February, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and, at said meeting, said stock notes were subscribed by said subscribers of stock and delivered to said corporation.

That at the time of said meeting the Articles of Incorporation of said Fairbanks Banking Company had not been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a board of directors, and twelve directors were elected at said meeting, and it was agreed that said board of directors should act as such until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws be adopted.

IX.

That said Articles of Incorporation did not arrive

in Fairbanks until sometime in the month of March, 1908, and immediately thereafter a meeting of the stockholders of the Fairbanks Banking Company, a corporation, was called, and at said meeting said stockholders, among other things, adopted [945] by-laws and elected a board of directors, and also passed a resolution to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the board of directors.

That at said meeting of the stockholders, the notes made and executed by the subscribers for stock upon the 8th day of February, 1908, were submitted to said stockholders, and the person who had subscribed for stock were declared to be stockholders of said corporation.

X.

That immediately after the adjournment of said stockholders meeting, the board of directors met and organized by the election of a president, vice-president, cashier, assistant cashier, secretary and treasurer, and at said meeting it was moved and duly seconded and carried "that the directors ratify the arrangement as to the taking over of the assets, property and business, and liabilities, of E. T. Barnette, James W. Hill, and R. C. Wood, upon the terms and conditions set forth in the minutes of the meeting of subscribers held January 5, 1908," which said terms and conditions are set forth in paragraph 5 of these findings.

XI.

That at said meeting of the directors, a resolution

was passed that the executive committee theretofore appointed at the meeting of the board of directors be empowered to see that all papers and transfers be made properly by the officers of the old Fairbanks Banking Company, a partnership, and that such transactions be legally carried out.

XII.

That thereupon said executive committee met and went over the resources and liabilities of said Fairbanks Banking Company, a [946] partnership, and instructed the attorneys of said corporation to prepare the necessary transfers conveying the property of said Fairbanks Banking Company, a partnership, to the corporation upon the terms and conditions set forth in the minutes of the meeting of January 5, 1908, save and except that certain notes which were then in existence were not to be turned over to the new corporation which thereby reduced the amount of shares of stock to be issued to said copartners.

XIII.

That at said meeting held by the proposed stockholders of said corporation on January 6, 1908, it was believed by all present that the organization of the Fairbanks Banking Company, a corporation, could be perfected by February 15, 1908, and that upon said date said corporation could take over the affairs of the partnership. That it was then agreed, that as the expenses of operating the bank from that date up to the time of taking over the affairs of the partnership by the corporation would fall on the partnership, that by reason thereof said partnership

should be entitled to all interest on existing loans as of December 12, 1907 until the affairs of the partnership were turned over to the corporation, and at said meeting it was agreed and declared that said copartnership should be entitled to interest on existing loans as of date December 12, 1907 up to the 15th day of February, 1908.

XIV.

That at the meeting of the directors held on the 12th day of March, 1908, the matter of allowing the copartnership accrued interest up to March 16, 1908, when it was contemplated that the corporation would take over the business of the partnership, was taken up and discussed, and at said meeting it was agreed that all interest on existing loans as of December [947] 12, 1907 be computed to March 15, 1908, and that the amount of such accrued interest be placed to the credit of the partnership on the books of the corporation, and that the same be payable to said partnership on December 31, 1908.

XV.

That thereafter, to wit, on the 23d day of March, 1908, and in accordance with said understanding and agreement between said copartnership and said corporation as to said accrued interest, the said corporation credited the partnership with the amount of said interest, to wit, the sum of $39,642.81, and the same was thereafter paid to the members of said partnership by said corporation, in accordance with the terms of said agreement.

XVI.

That during all the negotiations heretofore men-

tioned the defendant R. C. Wood was not in Alaska, and was either in the State of California or the State of Washington. That said Wood's name was signed to the original subscription list, without his knowledge, by E. T. Barnette, and with the understanding of all the subscribers that it was optional with the said R. C. Wood on his return to Fairbanks, Alaska, to elect either to take stock in the new corporation, or to receive money for the amount of stock to which he was entitled in lieu thereof.

XVII.

That in accordance with the directions of the board of directors made upon the 12th day of March, 1908, to the executive committee, the executive committee proceeded to have the necessary papers and transfers made out conveying the property of the partnership to the corporation on the terms stated in the resolutions of January 5, 1908, and requested that the then attorneys of [948] the bank prepare the necessary papers for that purpose. That in compliance with said request, the said attorneys undertook to draw up an agreement stating the true terms and conditions of said sale and transfer, which is the agreement attached to plaintiff's said amended complaint and marked exhibit 1. That said agreement, through the mutual mistake of the partners and corporation, and without the fault of either, failed to set forth truly all the terms and conditions of the agreement between said Fairbanks Banking Company, a copartnership, and the corporation, in this; first, that said agreement failed to reserve to said copartners the accrued interest on all loans in existence on the

12th day of December, 1907, up to the 15th day of March, 1908, and second, in that it failed to embody the option given to said James W. Hill and R. C. Wood either to take stock for their portion of the surplus property of the partnership or to take money, and that in the event of their desire to take money that the amount should be paid to them not later than July 1, 1908.

XVIII.

That, with said exceptions, said agreement attached to plaintiff's amended complaint and marked exhibit 1 fully sets forth the terms and conditions agreed on and entered into between the Fairbanks Banking Company, a copartnership, and the corporation.

XIX.

That the value placed upon said assets of the partnership was the value placed thereon by the stockholders, and that the resolution of the stockholders of March 12, 1908 authorizing the directors to take over such assets contemplated only the execution of the formal papers necessary for the purposes of the transfer, and not that the directors should exercise their individual judgment in determining the value of such assets. [949]

XX.

That in accordance with the true agreement had between the copartnership and the corporation, the Fairbanks Banking Company, a corporation, issued to E. T. Barnette 260 shares of the capital stock of said corporation, and to James W. Hill 130 shares thereof, but no stock was ever issued or delivered to

said R. C. Wood. That said R. C. Wood returned to Fairbanks, Alaska, on or about the 14th day of April, 1908, and at once notified the said corporation of his election to take money in lieu of stock, and at said time, and after reading said agreement of March 16, 1908, being exhibit 1 attached to plaintiff's amended complaint, refused to sign the same for the reason that in said agreement it set forth that he had subscribed for stock. That at said time it was agreed between the said R. C. Wood and the said corporation that he should have the right to take cash instead of stock up to July 1, 1908, and at said time there was shown to said Wood by said corporation the report of the committee of January 5, 1908 and the minutes of the corporation of March 12, 1908.

XXI.

That said Wood signed the said agreement of March 16, 1908, marked exhibit 1 attached to plaintiff's amended complaint, with the distinct understanding on his part and of the Fairbanks Banking Company, a corporation, that said report and minutes reserved to him the right to take money in lieu of stock; and it was never contemplated or understood by the said R. C. Wood or by the said corporation that by signing said agreement he would waive any right to take money in lieu of his stock. [950]

XXII.

That said Wood on or about the 17th day of April, 1908 entered upon his duties as cashier of said corporation, and continued as such cashier up until the 29th day of June, 1908.

XXIII.

That the board of directors and officers of said bank, in paying the money to said R. C. Wood, merely carried out the terms of the agreement entered into between said Wood and said corporation.

XXIV.

That the said sum of $39,642.81 placed to the credit of said copartnership on the books of the corporation on March 23, 1908, and thereafter, and upon the 31st day of December, 1908, paid to said partners, was done in accordance with the terms of the agreement made and entered into between the copartnership and the proposed incorporators on January 6, 1908, save and except that the time thereof was subsequently extended by the board of directors from the 15th day of February, 1908 to the 15th day of March, 1908.

XXV.

That the acquisition and purchase by the corporation of the assets and business of the Fairbanks Banking Company, a copartnership, was done by the stockholders of said corporation, and that the agreement entered into between the Fairbanks Banking Company, a partnership, and the proposed incorporators was long prior to the election of said board of directors, and said board of directors in authorizing the taking over of the property of said copartnership on the terms set forth in said agreement were carrying out the instructions of the stockholders, and such act was a ratification of the arrangement entered into between the [951] proposed incorporators of said corporation and the Fairbanks Banking Company, a partnership.

XXVI.

That said directors of said corporation, in taking over the assets and liabilities of said copartnership, acted in good faith and after careful inquiry and investigation had been made to determine the actual value of the assets of said copartnership.

XXVII.

That at the time of the purchase of the Washington-Alaska Bank, a corporation organized and existing under the laws of the State of Washington, and engaged in a general banking business in Fairbanks, Alaska, the stock of said corporation was worth the sum of $250, 000, and the directors of said Fairbanks Banking Company, a corporation, in the purchase and acquisition of the stock of said Washington-Alaska Bank acted honestly and in good faith, and did not pay an excessive valuation for the same.

XXVIII.

That in the month of May, 1909, the said Washington-Alaska Bank of Washington, and the Fairbanks Banking Company, purchased the entire capital stock of the First National Bank of Fairbanks, Alaska, for the sum of $125,000, and at said time the said Washington-Alaska Bank and the said Fairbanks Banking Company gave to the defendant R. C. Wood an option to purchase said stock of first National Bank for the sum of $125,000 at any time during the month of May, 1910. That upon said date, said Wood and the defendant McGinn purchased said stock under said option and paid said banks therefor the sum of $125,000, and said stock [952] was at that time transferred and delivered to them.

XXIX.

That the purchase of said stock of the First National Bank by the said Washington-Alaska Bank and the Fairbanks Banking Company was of advantage to said banks; and that no damage resulted from the giving of said option and the sale of said First National Bank stock to said Wood and McGinnor was the same fraudulent or illegal.

That the only director now before the court, who was a member of the board of directors during all of the foregoing transactions, is the defendant John A. Jesson. That the defendants James W. Hill and R. C. Wood were not members of the board of directors.

XXX.

That the Articles of Incorporation of said corporation authorized and empowered said corporation, among other things,

> To buy and sell gold and silver bullion, foreign coin, stocks, bonds and all other property, real and personal, and to do any business and exercise any powers incident to the banking business, or necessary or proper to the furtherance and attainment of the purposes of said bank.

XXXI.

That subdivisions 5 and 6 of Article xii of the by-laws of said corporation, adopted at the stockholders meeting held March 12, 1908, provided that all issued and outstanding stock of the company that may be donated to, or purchased by, the company, or which shall revert by reason of failure to pay for the same, shall be treasury stock, and shall be held subject to

the disposal of the action of the board of directors. Said stock shall neither vote nor participate in dividends while held by the [953] company. The board of directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same provided said board of directors shall offer to pay to said stockholder the same amount as he might obtain from any other person.

XXXII.

That on the 14th day of September, 1908, the executive committee of the said Fairbanks Banking Company, consisting of Barnette, President, Hill, vice-president, Dusenbury, cashier, and directors Jonas, John Jesson and Ryan, passed a resolution to the effect that said corporation would not take over any more stock of the stockholders, which said resolution of the executive committee was approved and ratified by the board of directors on October 14, 1908, the directors present at said meeting being: Hill, Peoples, Yarnell, Robinson, Ryan, Jonas and Jesson, and also the said Dusenbury was present.

XXXIII.

That on the 18th day of September, 1908, Oscar Goetz was the owner of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without their fault, and in violation of the resolutions hereinbefore in the preceding paragraph set forth, was cancelled by J. A. Jackson, assistant cashier of said bank, and the sum of $1,000 paid to said Goetz

out of the funds of said bank, and said stock debited to treasury stock. [954]

XXXIV.

That on the 18th day of September, 1909, the said J. A. Jackson, assistant cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive committee, debited treasury with the amount of G. A. Vedin's stock $500. That at said time the said Vedin's name did not appear as a stockholder in the books of said bank, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Vedin for or on account of said transaction.

XXXV.

That on the 24th day of October, 1908, B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors. and without any fault on their part, and in violation of said hereinbefore mentioned resolutions of the executive committee and board of directors, debited treasury stock on account of McDonnell stock in the sum of $200.00. That at said time the said McDonnell's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any moneys whatsoever for or on account of any of the stock of said bank. And that no money was paid to said McDonnell for or on account of said transaction.

XXXVI.

That upon the 18th day of November, 1908, Strandberg Brothers were the owners of 100 shares of the outstanding capital stock of said Fairbanks Banking Company, Emma Strandberg was the owner of 10 shares, and B. E. Johnson was the owner of 10 shares. [955]

That said stock was taken in part payment of a loan that the bank had theretofore made to said Strandberg Brothers and said Johnson, who were mining copartners, and the bank also received at said time the further sum of $1000 in cash, which fully paid said loan. That said transaction amounted to the taking of stock for a pre-existing debt, rather than the purchase of stock by the board of directors. That said directors believed at said time that said loan was precarious; and said directors, in taking said stock in partial satisfaction of said loan, did so in good faith and believing it to be for the best interests of the corporation.

XXXVII.

That upon the 12th day of January, 1909, the said J. A. Jackson, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolutions, debited treasury stock on account of F. E. Johnson's stock in the sum of $200. That at said time the said Johnson's name did not appear as a stockholder in the stock books of said corporation, nor had any stock been issued to him, nor had he paid any moneys for or on account of any stock of said corporation, bank;

and no money was paid to said F. E. Johnson for or on account of said transaction.

XXXVIII.

That on the 3d day of February, 1909, at a meeting of the executive committee of said bank, it was again resolved that the officers of said bank be directed to say that "the corporation did not desire to buy in its stock at present", which said resolution of the said executive committee was thereafter and on [956] to wit, the 13th day of February, 1909, approved and ratified by the said board of directors.

XXXIX.

That upon the 9th day of February, 1909, John Clifford was the owner of two shares of the outstanding capital stock of said corporation, and upon said date the said B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore set forth, cancelled said stock, and debited treasury stock with the sum of $200, and said Dusenbury paid the said Clifford out of the funds of said bank the said sum of $200.

XL.

That upon February 19, 1909, George Jestel was the owner of 5 shares of the outstanding stock of said corporation, and upon said date applied to said bank to purchase the same. That at said time, the said board of directors passed a resolution to the effect that the matter of taking over the Jestel stock be left to the officers of said bank, and, upon the 19th day of February, 1909, the officers of said bank cancelled

the stock of said George Jestel, debited treasury stock with said sum of $500, and paid to the said Jestel out of the funds of said bank the said sum of $500.

XLI.

That on the 15th day of March, 1909, H. B. Parkin, who was the owner of 10 shares of the outstanding capital stock of said bank, and Oscar Tackstrom, who was the owner of 5 shares of the said outstanding capital stock, requested the executive committee of said bank to buy their stock. [957]

That said executive committee thereupon again announced its policy, by resolving "It was the sense of the meeting that the bank observe the rule established at a previous meeting of the board wherein it was declared not to buy in any more stock," which said resolution was approved and ratified by the board of directors at said meeting held April 12, 1909, at which meeting of the directors the following officers and directors were present: Barnette, Claypool, Hill, Jesson, Robinson, Yarnell, Brumbaugh, Peoples and Dusenbury.

XLII.

That upon the 10th day of June, 1909, Hard & McConnell were the owners of 10 shares of the outstanding capital stock of said corporation, and upon said date said stock, without the consent, knowledge, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, which were all well known to the officers of said bank, was cancelled by J. A. Jackson, assistant cashier, and the

sum of $1,000.00 was credited to the deposit account of said Hart & McConnell on the books of said bank and said stock debited to treasury stock.

XLIII.

That upon the 21st day of August, 1909, Louis and Oscar Enstrom were the owners of 10 shares of the outstanding capital stock of said Fairbanks Banking Company, and upon said date the said stock, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, was cancelled by B. R. Dusenbury, its cashier, and the sum of $1,000 was placed to the credit of said Louis and Oscar Enstrom on the books of said bank, and said stock debited to treasury stock. **[958]**

XLIV.

That in the month of May, 1909, H. B. Parkin, who was the owner of 10 shares of the outstanding capital stock of said corporation, sold his stock to B. R. Dusenbury, cashier, and the said Dusenbury paid therefor the sum of $1,000. That said stock was not transferred on the books of said company to said B. R. Dusenbury, but remained on the books in the name of said H. B. Parkin. That thereafter some officer of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, made a memorandum note for the sum of $1,000.00 on account of the Parkin stock, to which said memorandum note some officer of said bank signed the name of D. Michie; that thereafter, and on the 28th day of October, 1909,

J. A. Jackson, then cashier, without the knowledge, consent or approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions which had theretofore been adopted by said board of directors, of which the said J. A. Jackson had full knowledge, cancelled the said memorandum note, and debited treasury stock with the sum of $1,000.

XLV.

That upon the 28th day of October, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the said hereinbefore mentioned resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Alex Cameron with $100.00, and also debited treasury stock $200 on account of Edith McCormick, and also debites treasury stock on account of J. W. McCormick in the sum of $200. That at said time the said Cameron, and the said [959] McCormicks' names did not appear as stockholders in the stock books of said corporation, nor had any stock been issued to them, nor had they paid any money whatsoever for or on account of any stock of said bank; and that no money was paid to said Cameron or to said McCormicks for or on account of said transaction.

XLVI.

That upon the 10th day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and

in violation of said hereinbefore mentioned resolutions, of which the said Jackson had full knowledge, debited treasury stock on account of one Francis H. Taylor in the sum of $500; that at said time the said Francis H. Taylor's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Taylor for or on account of said transaction.

XLVII.

That on the 23d day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of the hereinbefore mentioned resolutions, debited treasury stock on account of McGowan & Clark stock in the sum of $500. That at said time the said McGowan & Clark's name did not appear as stockholders in the books of said bank, nor had any stock been issued to them, nor had they paid any money for or on account of any of the stock of said corporation; and that no money was paid to said McGowan & Clark for or on account of said transaction.
[960]

XLVIII.

That upon the 18th day of January, 1910, Horton & Dunham were the owners of five shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express

violation of the resolutions hereinbefore mentioned, was cancelled by J. A. Jackson, cashier, and the same was debited to treasury stock, and the sum of $500 placed to the credit of said Horton & Dunham on the books of said bank. That at said time the said Horton & Dunham were indebted to said Fairbanks Banking Company.

XLIX.

That for several years prior to the 13th day of October, 1910, the First National Bank of Fairbanks was engaged in the banking business in the town of Fairbanks, and ever since on or about the first day of May, 1910, the principal stockholders of said bank were R. C. Wood and John L. McGinn, and said bank was a competing bank with the Washington-Alaska Bank, formerly the Fairbanks Banking Company, and the competition was extremely keen between said banks.

L.

That John L. McGinn was a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, and was the owner of 100 shares of the outstanding capital stock of said Washington-Alaska Bank, of the par value of $10,000.

LI.

That a short time prior to the 13th day of October, 1910, John L. McGinn, as a stockholder of the Washington-Alaska Bank, formerly the Fairbanks Banking Company, demanded the right to **[961]** inspect its books and papers, and threatened that, unless this right was granted him immediately, to make application for an order permitting him to do so and

for the appointment of a receiver of the said Washington-Alaska Bank. That the directors of the Washington-Alaska Bank, fearing that information obtained by such an investigation would be used by said McGinn in promoting the interests of the First National Bank in its business, and that if such information was refused and any litigation was started it would impair public confidence in the Washington-Alaska Bank and perhaps start a run of its customers and depositors on said bank, acting under this belief, authorized the cashier to loan a purchaser sufficient funds to pay for the stock of said McGinn; one of the directors stating at said time that he had a purchaser who would be willing to purchase said stock for the sum of $6,000, but it would be necessary for him to borrow money to complete said purchase; that, as the matter was urgent and the purchaser was not immediately available, the cashier purchased the stock in his own name and gave his note to the bank for the amount thereof and paid to said John L. McGinn the sum of $6,000.00 for his 100 shares of capital stock. That thereafter, and on or about the 25th day of October, 1910, said cashier, without the knowledge of any of the directors, cancelled his note and charged the amount thereof to the bank, and surrendered the stock to the bank, and the stock was thereafter held, with other treasury stock of the company.

LII.

That upon the 13th day of October, 1910, the director, George Preston, by reason of sickness of his family, was quarantined and unable to attend the

meeting of the board of directors held on said day, and was not present thereat, and knew nothing of the action taken at the meeting of said board. **[962]**

LIII.

That at the time of the taking over of all of the stock hereinbefore mentioned and in the amended complaint mentioned, the assets of said corporation exceeded its liabilities, and the earnings and net profits on hand greatly exceeded the par value of the stock so surrendered, cancelled, and returned to the treasury stock of said corporation.

LIV.

That on the 21st day of September, 1909, the assets of said corporation, not including the interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $23,032.03.

LV.

That on the 28th day of October, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $26,857.68.

LVI.

That on the 10th day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $8,896.75.

LVII.

That on the 23d day of November, 1909, the assets of said corporation, not including interest which had

been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $29,890.74.

LVIII.

That on the 18th day of January, 1910, the assets of said corporation, not including interest which had been earned, but [963] not paid and which was not included or carried as an asset, exceeded its liabilities in the sum of $11,984.63.

LIX.

That it has not been shown that the creditors, who were existing at the time of the surrender of said stock and the cancellation there as hereinbefore set forth, have not been paid in full by said Washington-Alaska Bank of Nevada, save and except that on July 1, 1908, there was existing creditors, who have not since been paid in full, to the amount of $4,000, and of said sum one-half thereof has since been paid by the receiver.

LX.

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed that they had a right to purchase and take back the stock of said corporation, and were advised by the attorneys of said bank that they had such right.

LXI.

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed, and had a right to believe, that the assets of said bank exceeded its liabilities, and that there were net prof-

its which greatly exceeded the par value of the stock so surrendered and cancelled.

LXII.

That all of said stock so debited to treasury stock was thereafter carried as an asset of the corporation, and it was not the intention by said transactions to reduce the capital **[964]** stock of said corporation or to retire the same; but, on the contrary, it was the intention to reissue the same to others.

LXIII.

That on the 24th day of March, 1909, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding capital stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $173,600.

LXIV.

That on September 14, 1909, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the Clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement showed that upon said date the outstanding capital stock of said corporation was of the par value of $172,600.

LXV.

That on September 10, 1910, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the Clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $169,600. [965]

LXVI.

That the end of fiscal year of the Washington-Alaska Bank of Washington, and of the Fairbanks Banking Company was the 31st day of December of each year, and at said time it had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their officers were bad and uncollectible and which had not been charged off during said fiscal year.

LXVII.

That said bad debts due to the bank and so charged off were not, after said time, carried as an asset of said bank; and, after said bad debts had been deducted from the assets, any profits that were shown to exist, after the deduction of all liabilities including outstanding stock, was placed in the undivided profit account, and was so carried until the end of the next fiscal year unless a dividend was declared upon the same or bad debts charged against the same during the next succeeding fiscal year.

LXVIII.

That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of the loans and discounts of said bank that he considered bad and uncollectible. That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible, and presented the same to said R. C. Wood, and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the **[966]** same amounting to the sum of $8,599.59. That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of $56,106.97.

LXIX.

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

LXX.

That the said R. C. Wood was a man of high stand-

ing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the conditions of said Washington-Alaska Bank, and of the securities held by it for loans made by, and due to, said bank.

LXXI.

That the said R. C. Wood, immediately after his appointment as advisory manager of said banks, prepared a record of all the loans and discounts of said Washington-Alaska Bank and said Fairbanks Banking Company, which said record contained the names of the debtors, the amounts due the said Washington-Alaska Bank and Fairbanks Banking Company, and a description and the location of all property, real and personal, given to secure the loans made by said banks, which said record ever since the month of May, 1910, has been a record of said Fairbanks Banking Company, and is now in the possession of the receiver thereof. [967]

LXXII.

That said record-book so containing the names of the debtors of said Washington-Alaska Bank and the Fairbanks Banking Company, and a description and location of the properties given to secure said debts, although in the possession of the present receiver from the date of his appointment, was never examined by him, and the securities mentioned and described in said book given to secure loans, were not known to him to be in existence.

LXXIII.

That at the end of the fiscal year 1909, the said R. C. Wood, requested J. A. Jackson, cashier of the

Fairbanks Banking Company to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $24,937.37.

That said loan and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of $9,881.78.

LXXIV.

That the said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank, and the standing of its debtors. [968]

LXXV.

That at the meeting of the board of directors of said Fairbanks Banking Company held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts hereinbefore mentioned

had been charged off, were presented by the officers of said banks to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed. That said statement showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of $56,106.97.

That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending December 31, 1909, after deducting all the bad debts, was the sum of $9,881.78.

LXXVI.

That upon the 12th day of April, 1910, the directors of the Washington-Alaska Bank declared a dividend of $50,000.

LXXVII.

That said dividend of the Washington-Alaska Bank of Washington, to wit, $50,000, was paid to its stockholder the Fairbanks Banking Company; $25,000 of which said sum was ordered by the directors to be placed to the credit of the undivided profit account of said Fairbanks Banking Company, and the other $25,000 was directed to be credited on the amount for which said Fairbanks Banking Company was carrying the stock of said Washington-Alaska Bank. [969]

LXXVIII.

That after said sum of $25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of

said bank at said time amounted to the sum of $34,-828.55.

LXXIX.

That at the date of the declaration of said dividend, and after the adding of said sum of $25,000 to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of $34,828.55, and the directors at said time honestly and in good faith believed that the undivided profit of said Fairbanks Banking Company was said sum of $34,828.55, and said directors were so advised by the officers of said bank.

LXXX.

That the profit of said Washington-Alaska Bank, and Fairbanks Banking Company, and First National Bank for the year ending December 31, 1909, was the sum of $131,332.91; and, after charging off bad debts on said three banks to the amount of $42,836.96, the net profit of said three banks for said year was $88,495.95.

LXXXI.

That the said Fairbanks Banking Company, at the time of the declaration of the dividend, was carrying the stock of the Gold Bar Lumber Company for the sum of $341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said property and the value thereof, had a right to believe that said property was worth said amount.

[970]

LXXXII.

That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of $27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

LXXXIII.

That said dividend was declared by said directors of said bank in good faith and in the honest belief, and after the exercise of due care, that the undivided profits of said banks amounted to said sum of $34,828.55, and that the values placed upon the assets of said bank was the true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

LXXXIV.

That the directors of said bank, in making loans of the funds of said bank, acted carefully, honestly, and after careful inquiry and investigation had been made as to the standing of the borrowers and investigation made of the properties which were offered for security, and that said directors were acquainted with the loans and securities of said bank.

LXXXV.

That E. T. Barnette, who is jointly charged with these defendants as to all the wrongs complained of in plaintiff's amended complaint on file herein, was, during the time of all the [971] transactions mentioned in said amended complaint, the president of said Fairbanks Banking Company, afterwards known as the Washington-Alaska Bank, and one of its directors.

LXXXVI.

That at the time of the suspension of the Washington-Alaska Bank of Nevada, the said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said bank and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of any of the matter and things set forth in plaintiff's amended complaint. [972]

LXXXVII.

That as a result of said negotiations, and in full satisfaction of all the wrongs complained of in plaintiff's amended complaint, the said E. T. Barnette on the 8th of March, 1911, executed an instrument in writing in which he admitted his liability to the creditors and depositors of said bank, and promised and agreed to pay all the depositors and creditors of said bank in full not later than the 18th day of November, 1914, together with interest on all amounts due to creditors and depositors from the 4th day

of January, 1911, until paid.

LXXXVIII.

That Isabelle Barnette was, and is, the wife of the said E. T. Barnette, and the said Isabelle Barnette was desirous of aiding her said husband in the payment of the creditors and depositors of said Washington-Alaska Bank of Nevada, and to that end joined her said husband in the promise to pay all the depositors and creditors of said Washington-Alaska Bank of Nevada on the terms set forth in the preceding paragraph.

LXXXIX.

That said promise was made upon the distinct understanding that no litigation would be instituted against the said E. T. Barnette or others for or on account of any of the matters and things set forth in the amended complaint, and for this purpose, and to prevent any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said Isabelle Barnette and E. T. Barnette on the 18th day of March, 1911, with the knowledge and consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers by order of this Court accepted the conveyance of title to an improved plantation containing [973] 18,723 acres of land, situate in the Republic of Mexico, and certain improved and income producing business properties and lots situate in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer claims situate in the Fairbanks Precinct, Territory of Alaska; all

of which properties belonged at the time of said conveyance to the said E. T. Barnette and Isabelle Barnette.

XC.

That the property so conveyed by the said E. T. Barnette and Isabelle Barnette situated in the Republic of Mexico, was, at the time of said coveyance, of the value of $500,000. That at this time, owing to the unsettled conditions in said Republic of Mexico caused by rebellion and open warfare, it is difficult to determine what is the present value of said property situate in said Republic of Mexico, but said property is of great value, but the market value thereof cannot be determined at this time.

XCI.

That the property conveyed by the said E. T. Barnette and Isabelle Barnette in the town of Fairbanks, Territory of Alaska, is of the value of $25,000.

XCII.

That the value of the interest of the said E. T. Barnette and Isabelle Barnette in association placer mining claims situate in the Fairbanks Recording District, Territory of Alaska, and conveyed by them to said receivers is the value of $20,000.

XCIII.

That said receiver has received from said mining properties and said town properties, as rents, royalties and proceeds, up to the present time the sum of $31,400.00. [974]

XCIV.

That in said deed of said property in the Republic of Mexico it is expressly provided that said receiver

may sell all or any part of said land at private sale on or after the 18th day of November, 1914, for the purpose of raising funds with which to pay the claims of the depositors and creditors of said bank then remaining unpaid, and, out of the proceeds thereof, said receiver is directed to pay all the claims of depositors and creditors of said bank then remaining unpaid.

XCV.

That in said deed E. T. Barnette and Isabelle Barnette further authorize and empower said receiver to collect and receive the amount of $226,025 payable on the 18th day of November, 1914, in case of an option given on the 18th day of November, 1909, for the purchase of forty-nine per cent of said property situate in the Republic of Mexico, is exercised by the optionees mentioned in said option by that time, and to apply such sum to the payment of said claims of depositors and creditors of said bank.

XCVI.

That said deed to property situate in the Territory of Alaska also provides for and gives said receiver power to collect and receive all the rents, royalties and proceeds of the property therein described, and to sell said property and to apply the amount so received in payment of said claims of depositors and creditors of said bank at any time when it shall be deemed most advisable to do so by the said E. T. Barnette and Isabelle Barnette and the receiver; but that if said property is not so sold by the 18th day of November, 1914, that said receiver is then authorized to sell said property without the consent of said E. T. Barnette and Isabelle Barnette and to apply the

amount so received in payment of the claims of the creditors and [975] depositors of said Washington-Alaska Bank of Nevada.

XCVII.

That the said receiver holds a large amount of property belonging to said bank, which is of great value and has not been converted into money; and the property so held by him, and the property so conveyed to the receiver by the said E. T. Barnette and Isabelle Barnette, are more than sufficient to satisfy all the claims, demands and obligations of whatsoever nature now existing against said Washington-Alaska Bank of Nevada.

XCVIII.

That the receiver has received as rents, royalties and profits from the property of the said E. T. Barnette and Isabelle Barnette situate in the Territory of Alaska, the sum of $31,400, and that said amount. together with the property conveyed by the said E. T. Barnette and Isabelle Barnette, exclusive of the property situate in said Republic of Mexico, are more than ample to pay all the matters and things charged against these defendants in said amended complaint of plaintiff herein; and that all the wrongs and things charged against these defendants in said amended complaint have, by reason thereof, been fully satisfied and paid.

XCIX.

That the then receivers of the said Washington-Alaska Bank agreed to accept in full satisfaction of all the matters and things set forth in plaintiff's amended complaint and sued on herein, the said

promises and property of the said E. T. Barnette and Isabelle Barnette, and the said E. T. Barnette and Isabelle Barnette made and executed said promises and conveyed [976] said property, in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the said Washington-Alaska Bank of Nevada, and in full satisfaction of all the matters and things set forth in plaintiff's amended complaint; and the said receivers accepted and received said promises and said property in full satisfaction of all claims and causes of action set forth in the amended complaint of the plaintiff herein.

C.

That the defendant John A. Jesson was a director of the Fairbanks Banking Company from the 12th day of March, 1908, until the 4th day of January, 1911.

That the defendant E. R. Peoples was a director of said Fairbanks Banking Company from October 14, 1908, until April 24, 1909.

That the defendant John L. McGinn was a director of said Fairbanks Banking Company from the 14th day of September, 1909, until the 1st day of May, 1910.

That the defendant R. C. Wood was a director of said Fairbanks Banking Company from the 13th day of November, 1909, until the 1st day of May, 1910.

That the defendant Brumbaugh was a director of said Fairbanks Banking Company from the 13th day of March, 1909, to the 12th day of September, 1910.

That the defendant Hill was a director of said Fairbanks Banking Company from the 12th day of September, 1908, until the 1st of October, 1909, when he left the Territory of Alaska for the States.

That the defendant Clark was elected a director of the Fairbanks Banking Company on the 12th day of May, 1910, and thereafter and on June 12, 1910, entered upon the discharge of his duties as such director, and was such director until the suspension [977] of said bank and the appointment of a receiver therefor.

That the defendant George Preston was elected a director of said Fairbanks Banking Company on the 12th day of September, 1910, and in the month of December, 1910, resigned as such director.

That defendant Healey was a director of the Fairbanks Banking Company from June 12, 1910, until the suspension of said bank and the appointment of a receiver therefor.

As conclusions of law, the Court finds:

CONCLUSIONS OF LAW.

I.

That the taking over by the Fairbanks Banking Company, a corporation, of the assets and liabilities of the partnership consisting of E. T. Barnette, James W. Hill and R. C. Wood was done honestly and in good faith, and after said directors had used the diligence in ascertaining and determining the value of the assets and liabilities of said bank.

II.

That the payment of said sum of $13,000 to R. C. Wood by said corporation was done in accordance

with the true terms of the agreement entered into between the said R. C. Wood and the said Fairbanks Banking Company, a corporation.

III.

That the sum of $39,642.81 to said E. T. Barnette, R. C. Wood and James W. Hill for interest on loans that were existing December 12, 1907, up to March 15, 1908, was in accordance with the [978] true intent and spirit of the agreement entered into between the stockholders of said Fairbanks Banking Company, a corporation, and the said copartners; and the said board of directors, in allowing interest as aforesaid, carried out the true intent and spirit of the agreement entered into between the said stockholders and the said copartners.

IV.

That the stock that was surrendered, and taken back by the directors, and of which said directors had knowledge, was taken honestly and in good faith and under the belief of the said directors that they had a right to take back said stock, and that the same was for the best interest of the corporation.

V.

That the balance of the stock so surrendered, and taken back by the officers of said bank, was done without the knowledge, consent, approval or acquiescence of said directors, and there was nothing to charge the said directors with knowledge that its officers were violating the resolutions of the said board of directors not to take back or cancel any stock.

VI.

That the declaration of the dividend by the direct-

ors was done by them honestly and in good faith and under the honest belief that the assets of said corporation exceeded its liabilities in the sum of $34,828.55, and that there was net profits to said amount; and that said directors believed at said time that the assets were of the value that said corporation was carrying them. [979]

VII.

That the directors of the Washington-Alaska Bank were entitled to place confidence in their cashier, and were not guilty of negligence in connection with the cancellation of the note given by him to the corporation in connection with the purchase of the John L. McGinn stock, and that under the circumstances then existing said directors were justified in purchasing said stock from the said John L. McGinn for the bank, had it become necessary so to do, or in loaning the sum of $6,000.00 to the purchaser thereof; and that in the taking back of said stock said directors acted honestly and in good faith and for the best interest of the corporation.

VIII.

That the directors of said bank had a right to rely upon the honesty and fidelity of their officers, and are not chargeable with any acts that said officers did in violation of the instructions of said board of directors.

IX.

That the allegations of plaintiff's amended complaint are untrue, and the allegations of the defendants' answers are true.

X.

That the plaintiff is not entitled to recover any

judgment whatsoever against any of the defendants Jesson, Hill, Wood, Brumbaugh, McGinn, Peoples, Clark, Healey and Preston, or either of them.

XI.

That defendants are entitled to a decree that the plaintiff recover nothing by this action, and that defendants have judgment for their costs and disbursements. [980]

A. R. HEILIG and
JOHN L. McGINN,
Attorneys for Defendants Wood, Healey, Peoples and McGinn.

McGOWAN & CLARK,
Attorneys for Defendants Peoples, Jesson, Wood, McGinn, Hill, Brumbaugh, Clark, Preston and Healey. [981]

Which Findings of Fact and Conclusions of Law so requested by the defendants the Court refused to make and find as the Findings of Fact and Conclusions of Law in said cause, save and except that the Court made and found as part of the Findings of Fact in said cause paragraphs 3, 4, 5, 6, 7, 8, 9, 30, 31, 32, 36, 38, 41, 50, 51 and 52 of said defendants' request for Findings of Fact, and to the ruling of the Court in refusing to make Findings of Fact as is set forth in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 37, 39, 42, 43, 44, 45, 46, 47, 48, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98 and 99 as requested by the defendants, the defendants then

and there excepted to the refusal of the Court to make each, any and all of said requested findings and an exception was then and there allowed by the Court to the refusal to allow, each, any and all thereof.

And to the refusal of the Court to make Conclusions of Law requested by the defendants as set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of said defendants' proposed Conclusions of Law the defendants then and there excepted and a separate exception was allowed by the Court after the refusal to make each, any and all of the same.

That before the Findings of Fact and Conclusions of Law were signed in the above-entitled cause, the defendants duly filed and presented to the Court their objections to the Findings of Fact and Conclusions of Law, as follows: [982]

[Title of Court and Cause.]

Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law.

BE IT REMEMBERED that upon this 22d day of May, 1914, the defendants Jesson, Peoples, Wood, Hill, Brumbaugh, McGinn, Clark, Preston and Healey, by their respective attorneys, hereby, and before any findings of fact and conclusions of law have been signed by the Judge of this court, object to the proposed findings of fact and conclusions of law requested by the plaintiff herein, as follows:

I.

Said defendants object to said request contained in paragraph II of said request for findings, for the reason that the same is not supported by the evi-

dence, in that the amount of subscribed capital stock of said Fairbanks Banking Company, upon the 16th day of March, 1908, did not amount to said sum of $206,000.00.

II.

Said defendants object to said request as set forth in paragraph III thereof, for the reason that the same is contrary to the evidence, and particularly because the said R. C. Wood never subscribed for 220 shares of the capital stock of said Fairbanks Banking Company, or any shares.

III.

Said defendants object to that portion of paragraph IV of said request for findings, wherein it is stated that said [983] Fairbanks Banking Company was unable to meet its obligations, for the reason that the same is contrary to the evidence in this case, that the evidence discloses that the resources of said bank at that time greatly exceeded its liabilities, but that owing to the financial flurry then existing throughout the United States, said bank was unable to pay all its depositors in cash and on that account was compelled to temporarily suspend its business.

IV.

Said defendants object to that portion of paragraph VIII of said request for findings, wherein it is stated that the said Wood, together with other subscribers were declared to be stockholders of said corporation, for the reason that the same is contrary to the evidence, the evidence disclosing that at said time said directors knew that it was optional with the said Wood up to the first day of July, 1908, to

take said stock or money in lieu thereof, and that that portion thereof wherein it is stated that the said Wood was notified of the result of said meeting of stockholders, by the defendant Hill, is not supported by the evidence.

V.

Said defendants object to that portion of said request for findings numbered 8 which states that said board of directors ordered that stock be issued to Wood in exchange for property to the amount of 220 shares, for the reason that there is no evidence to support the same, and the same is contrary to the evidence.

VI.

The said defendants object to paragraph X of said request for findings, wherein it is stated that the said R. C. Wood, at the time said agreement was signed, was the cashier of said bank, for the reason that same is not supported by the evidence. [984]

VII.

Said defendants object to paragraph XII of said request for findings, for the reason that the same is not supported by the evidence.

VIII.

Said defendants object to paragraph XIII of said request for findings, for the reason that the same is contrary to the evidence offered in the above-entitled case, in that it does not appear that the said Wood was fully advised by said Hill, by letters and telegrams, of all the negotiations leading up to the making of said written agreement mentioned therein.

IX.

Said defendants object to paragraph XIV of said

request for findings, for the reason that the same is contrary to the evidence and for the reason that the evidence discloses that at said time the said Wood was not apprised of the true terms of the agreement entered into between said proposed stockholders and the copartnership.

X.

Said defendants object to paragraph XVI of said request for findings, for the reason that the same is contrary to the amended complaint of plaintiff herein, is not supported by the evidence, but is contrary thereto.

XI.

Said defendants object to that portion of paragraph XVII of said request for findings, wherein it is stated that said two notes executed by Tanana Electric Company, in the sum of $27,997.38, depended for their value upon the alleged guaranty of the Scandinavian-American Bank, to make advancements sufficient to cover the same, which said guaranty never had any existence in fact, for the reason that the same is contrary to the evidence in this case, both that offered by the plaintiff [985] and the defendants, and the same is not supported by any evidence; and object to that portion of said finding wherein it is stated that said claim had been repudiated by Scandinavian-American Bank prior to the time said note was accepted by said board of directors and the same was known to the members of said board, for the reason that the same is not supported by any evidence and is contrary to the evidence offered in the above-entitled cause.

XII.

Said defendants object to paragraph XVIII of said request for findings, for the reason that the same is contrary to the evidence offered in the above-entitled cause, and no evidence was offered on the trial in support thereof.

XIII.

Said defendants object to paragraph XX of said request for findings, for the reason that the same is not supported by any evidence offered on the trial of said cause and is contrary to the evidence offered upon said trial; and said defendants particularly object to said portion of said finding wherein it is stated that said stock of the Gold Bar Lumber Company was accepted and paid for at a gross and fraudulent overvalue on the part of said board of directors, in the sum of $75,000.00, for the reason that the same is not a statement of any fact, but a conclusion of law and further that the same is not supported by any evidence introduced upon the trial of said cause; and also particularly to that portion wherein it is stated that at no time during the existence of said bank was said stock worth more than the sum of $266,949, for the reason that there was no evidence offered upon the trial to support the same, and the evidence is contrary thereto.

XIV.

Said defendants object to paragraph XXII of said [986] request for findings, for the reasons that the same is contrary to the evidence and not supported by the evidence given upon the trial of said cause, that the statement therein contained that

the said Wood entered upon his duties as cashier on the 16th day of March, 1908, is untrue, for the reason that said Wood in Seattle, Washington, could not perform the duties of cashier of a bank situate in Fairbanks, Alaska, and that such acts as were done by him in Seattle, in said capacity, were done by special authorization from the board of directors; and said defendants object to that portion of said finding wherein it is stated that the resignation of said Wood was to become effective at the close of business on June 30, 1908, for the reason that same is contrary to the evidence and in violation of the express admissions of the pleadings in this cause, and that the same is irrelevant and immaterial.

XV.

These defendants object to that portion of paragraph XXIV of said request for findings which states that said 130 shares was carried on the books of said bank as outstanding stock, March 16, 1908, to June 30, 1908, for the reason that the same is irrelevant and immaterial and not pertinent to any of the issues of the above-entitled cause, and not supported by any evidence.

XVI.

Said defendants object to paragraph XXV of said request for findings, wherein it is stated that on the 30th day of June, 1908, said certificate was signed by said B. R. Dusenbury as assistant cashier prior to the said resignation of said Wood as cashier became effective, for the reason that it is contrary to the evidence introduced in this case and contrary to the express admissions of the pleadings and not

supported by any evidence, the pleadings showing that said Wood's resignation took effect June 29, 1908. [987]

XVII.

Said defendants object to that portion of paragraph XXVI wherein it is stated that said Wood received on said certificate of deposit the sum of $13,000, for the reason that the same is contrary to the evidence, the said Wood having received for said certificate said amount of $13,000, less the discount which he was compelled to pay on same.

XVIII.

Said defendants object to that portion of paragraph XXIX of said request for findings, wherein it is stated that at the time said certificate of stock was issued the said R. C. Wood was cashier and a member of the executive committee, for the reason that the same is not supported by any evidence and is contrary to the admissions of the pleadings; and said defendants further object to all of said paragraph, wherein it states the names of the members of said executive committee, for the reason that the same is irrelevant and immaterial.

XIX.

Said defendants object to paragraph XXX of said request for findings, for the reason that the same is irrelevant and immaterial and not supported by any evidence offered on the trial of said cause.

XX.

Said defendants object to paragraph XXXIII of said request for findings, for the reason that same is not supported by any evidence offered on the trial

of said cause, but is directly contrary thereto and the same is irrelevant and immaterial; and said defendants object to that portion of said paragraph wherein it is stated that at said time the said R. C. Wood was cashier of said bank, for the reasons hereinbefore assigned, and for the further reason that the same is irrelevant and immaterial. [988]

XXI.

Said defendants object to paragraph XXXIV of said request for findings, in that the amount of the subscribed and outstanding capital stock of said corporation is misstated, for the further reason that the statement that only a small portion of said amount has been paid in in cash is irrelevant and immaterial, that the statement therein contained that all its funds $341,949 was at all times invested in the stock of Gold Bar Lumber Company, being $135,949 in excess of its subscribed and outstanding stock, is not a statement of any fact, but a mere deduction and calculation which is wholly irrelevant and immaterial to any of the issues of this cause; and that the statement therein set forth that the investment of its funds in said stock was the principal trouble of said bank is irrelevant, immaterial to the issues in this case and not supported by any evidence, and not a statement of a fact, but a mere conclusion; and that the further statement in said paragraph that at all times during the existence of said bank it was unable to withdraw said funds from said investment is not supported by any evidence, no evidence being offered upon that point.

XXII.

Said defendants object to paragraph XXXV of

said request for findings, as follows: to that portion thereof wherein it is stated that prior to closing down said Gold Bar Lumber Company had been operated at a loss, for the reason that the same is not supported by any evidence; that the statement contained in said paragraph that in the operation of said mill its standing timber was being consumed and its assets exhausted is irrelevant and immaterial and not pertinent to any of the issues of this cause.

XXIII.

Said defendants object to paragraph XXXVI of said request [989] for findings, for the reason that the same is irrelevant and immaterial and not supported by the evidence offered upon the trial of said cause, but is contrary thereto.

XXXIV.

Said defendants object to that portion of paragraph XXXVIII of said request for findings, wherein it is stated that said bank had no surplus or undivided profits against which the same could be charged, for the reason that the same is not supported by any evidence upon the trial of said cause and is contrary thereto.

XXXV.

Said defendants object to paragraph XXXIX of said request for findings, for the reason that the same is not supported by any evidence or law offered upon the trial of the above-entitled cause, and that same is a conclusion of law.

XXXVI.

Said defendants object to paragraph XLI of said request for findings, for the reason that the same is

a mere conclusion wherein it is stated that the aforesaid were acquiesced in by said board of directors, and the same is not supported by any evidence.

XXXVII.

Said defendants object to that portion of paragraph XLIV of said request for findings, wherein it is stated that said capital stock of said Washington-Alaska Bank was not worth to exceed $175,000.00, for the reason that the same is not supported by the evidence given upon the trial of the above-entitled cause and is directly contrary thereto; and also to that portion thereof wherein it is stated that the purchase of said capital stock was ratified and confirmed by said John A. Jesson, James W. Hilland, John L. McGinn, as members of the board of directors, on the 13th day of September, 1909, for the reason that the same [990] is not supported by the evidence given upon the trial of the above-entitled cause and is directly contrary thereto.

XXXVIII.

Said defendants object to paragraph XLV of said request for findings, for the reason that the same is not supported by any evidence given upon the trial of said cause and is directly contrary thereto.

XXXIX.

Said defendants object to paragraph XLVII of said request for findings, for the reason that the same is not supported by any evidence given upon the trial of the above-entitled cause, but is directly contrary thereto.

XL.

Said defendants object to paragraph XLVIII of

said request for findings, for the reason that the same is not supported by the evidence given upon the trial of the above-entitled cause, but is directly contrary thereto, particularly that portion thereof in which it is said that the same was declared and paid in violation of the laws of the State of Nevada, the same being not the statement of any fact, but a conclusion of law, and particularly that portion thereof, in which it says that the same was in violation of the by-laws of the Fairbanks Banking Company and was wrongful and illegal, for the reason that the same is not the statement of any fact, is not supported by any evidence offered upon the trial of the above-entitled cause, and is a mere conclusion of law.

XLI.

Said defendants object to paragraph LII of said request for findings, for the reason that the same is not supported by any evidence offered upon the trial of the above-entitled cause but is directly contrary thereto.

XLII.

Said defendants object to paragraph LIII of said request **[991]** for findings, for the reason that the same is argumentative and not the statement of any fact, that the same and the whole thereof is not supported by any evidence given upon the trial of said cause and also embraces within it matters expressly admitted by the pleadings upon which no finding is necessary.

XLIII.

Said defendants object to paragraph LIV of said request for findings, for the reason that there is no

evidence offered upon the trial to support the same and same is directly contrary thereto.

XLIV.

Said defendants object to paragraph LV of said request for findings, for the reason that there is not a scintilla of evidence in the above-entitled cause that the Tanana Electric Company note had been litigated with the Scandinavian-American Bank and that a decision denying the existence of said alleged guaranty was ever rendered.

XLV.

The defendants object to the conclusions of law requested by the plaintiffs, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 for the reason that the same are not supported by the findings of fact or the evidence offered upon the trial of the above-entitled cause, and are contrary to law.

Fairbanks, Alaska, May 22, 1914.

JOHN L. McGINN,
A. R. HEILIG,
McGOWAN & CLARK,
Attorneys for Said Defendants. [992]

[Title of Court and Cause.]

Exceptions to Findings and Conclusions Made by the Court, and to Refusal of the Court to Give Defendants Requested Findings and Conclusions.

BE IT REMEMBERED that upon the 11th day of June, 1914, the Judge of the above-entitled court made and filed with the clerk of said court its find-

ings of fact and conclusions of law in the above-entitled cause, and that thereupon the defendants J. A. Jesson, E. R. Peoples, R. C. Wood, James W. Hill, Raymond Brumbaugh and John L. McGinn excepted to such findings of fact and conclusions of law, and to the overruling of the objections of said defendants made thereto prior to the time that said findings of fact and conclusions of law were signed by the judge of the above-entitled court; and also excepted to the refusal of the Court to make findings of fact and conclusions of law as requested by said defendants as hereinafter more particularly specified.

I.

Said defendants except to paragraph II of the findings of fact so made by the court, which is the same finding requested by the plaintiff and numbered II in plaintiff's requested findings of fact and conclusions of law.

II.

Said defendants except to finding number III made by the Court, which is the same as is set forth in plaintiff's requested finding number III to which said defendants had theretofore [993] objected, with the exception that the Court has added to said finding the following: "the name of R. C. Wood being subscribed thereto by said E. T. Barnette"; to which portion thereof so added by the Court these defendants object, and except to the making and finding of the same.

III.

Said defendants except to that portion of finding number XIII made by the Court, and which said

finding was requested by the plaintiff as finding number VIII of plaintiff's requested findings, wherein it is stated that the said Wood, together with other subscribers, were declared to be stockholders of said corporation; and also that portion thereof wherein it is stated that the said Wood was notified of the result of said meeting of stockholders by the defendant Hill.

IV.

Defendants except to that portion of finding number XIV made by the Court, wherein it is stated that the said R. C. Wood at the time said agreement was signed was the cashier of said bank.

V.

Said defendants except to that portion of finding number XIX made by the Court wherein it is stated that the said Wood was fully advised concerning the same by the defendant Hill by letter and telegram.

VI.

Said defendants except to the ruling of the Court overruling the objections of these defendants to paragraph XX of the findings of fact made by the Court, which is the finding number XIV set forth in plaintiff's request for findings of fact. [994]

VII.

Said defendants except to finding of fact numbered XXII made by the Court, and to the overruling of the defendant's objections thereto, it being the same finding which is numbered XVI in plaintiff's request for findings of fact.

VIII.

Said defendants except to finding of fact numbered

XXIII made by the Court, and to the overruling of defendant's objections thereto, which is the finding requested by plaintiff as number XVII.

IX.

Said defendants except to findings of fact numbered XXIV so made by the Court, and to the overruling of the defendant's objections thereto, which is the finding numbered XVIII of plaintiff's request for findings of fact.

X.

Said defendants except to finding of fact number XXVII so made by the Court, and to the overruling of defendant's objections thereto, which is the same finding of fact numbered XXII of plaintiff's request for findings of fact.

XI.

Said defendants except to finding of fact number XXIX so made by the Court, and to the overruling of defendant's objections thereto, which is the same finding of fact numbered XXIV in plaintiff's request for findings of fact.

XII.

Defendants except to findings of fact number XXX so made by the Court, and to the overruling of their objections thereto, which is the same finding of fact numbered XXV of plaintiff's request for findings of fact. **[995]**

XIII.

Said defendants except to finding of fact numbered XXXIV so made by the Court, and to the overruling of defendant's objections thereto, which is the same finding of fact numbered XXIX of plaintiff's request

for findings of fact.

XIV.

Said defendants except to finding of fact number XXXV so made by the Court, and to the overruling of their objections thereto, which is the same finding of fact numbered XXX of plaintiff's request for findings.

XV.

These defendants object and except to finding of fact number XXXVII so made by the Court, for the reason that the same is not supported by the evidence.

XVI.

These defendants except to finding of fact number XXXVIII so made by the Court, and to the ruling of defendant's objections thereto, which is the same finding of fact numbered XXXIII of plaintiff's request for findings of fact.

XVII.

These defendants except to finding of fact number XL so made by the Court, and to the overruling of their objections thereto, which is the finding of fact numbered XXXV of plaintiff's request for findings of fact.

XVIII.

These defendants except to finding of fact number LI so made by the Court, and to the overruling of defendant's objections thereto, which is the same finding of fact numbered XXXVIII of plaintiff's request for findings of fact.

XIX.

These defendants except to finding of fact number

LII so made by the Court, and to the overruling of defendant's objections [996] thereto which is the same finding of fact numbered XXXIX of plaintiff's request for findings of fact.

XX.

These defendants except to finding of fact number LIV so made by the Court, and to the overruling of defendant's objections thereto, which is the same finding of fact numbered XLI of plaintiff's request for findings of fact.

XXI.

These defendants except to finding of fact number LVII so made by the Court, and to the overruling of defendant's objection thereto, which is the same finding of fact numbered XLIV of plaintiff's request for findings of fact.

XXII.

These defendants except to finding of fact number LVIII so made by the Court, and to the overruling of their objections thereto, which is the same finding of fact numbered LIII of plaintiff's request for findings of fact.

XXIII.

These defendants except to finding of fact number LIX so made by the Court, and to the overruling of defendant's objections thereto, which is the same finding of fact numbered LIV of plaintiff's request for findings of fact.

XXIV.

These defendants except to finding of fact number LXI so made by the Court, and to the overruling of their objections thereto, which is the same finding

of fact numbered XLVII of plaintiff's request for findings of fact.

XXV.

These defendants except to finding of fact number LXII so made by the Court, and to the overruling of defendants' objections thereto, which is the same finding of fact numbered XLVIII of plaintiff's request for findings of fact. [997]

XXVI.

These defendants except to finding of fact number LXVI so made by the Court, and to the overruling of defendants' objections thereto, which is the same finding of fact requested by the plaintiff as number LII in plaintiff's request for findings of fact.

XXVII.

Said defendants except to conclusions of law found by the Court, and to each and every thereof, and to the overruling of the said defendants' objections thereto.

And now, in pursuance of justice and that right may be done, the defendants present the foregoing as their Bill of Exceptions in this cause and pray that the same may be settled and allowed and certified by the Judge of this court in the manner provided by law.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,

Attorneys for defendants Wood, Hill, Peoples, Brumbaugh, McGinn and J. A. Jesson.

Service of a true copy of the foregoing Bill of Exceptions is hereby acknowledged this 6th day of July,

1914, at Iditarod, Alaska, by receipt of a true copy thereof duly certified to be such.

O. L. RIDER,
Attorney for Plaintiff. [998]

[Title of Court and Cause.]

Order Allowing and Settling Defendants' Bill of Exceptions.

BE IT REMEMBERED, that upon the 6th day of July, 1914, the above-named defendants presented the foregoing Bill of Exceptions to the Court for settlement, which said proposed Bill of Exceptions was served and filed within the time allowed by the orders of this Court; and it appearing to the Court from the examination of the proposed Bill of Exceptions that the same contains all the evidence, testimony and exhibits introduced and given upon the trial of said cause in support of and against the allegations and denials of the amended complaint, answer and reply relative to the subscription for taking over, surrender and cancellation of the capital stock of the said Fairbanks Banking Company, by the corporation and the directors thereof, except as to the stock of Strandberg Brothers, B. E. Johnson, Emma Strandberg and John L. McGinn; and also all of the testimony, evidence and exhibits introduced and given upon the trial of said cause in support of and against the allegations and denials of the amended complaint, answer and reply relative to the declaration of the dividend by the directors of the said Fairbanks Banking Company, and the payment

thereof; and also all of the testimony, evidence and exhibits introduced and given upon the trial of said cause in support of and against the further separate and affirmative defense of said defendants wherein it is alleged that there was a complete accord and satisfaction between E. T. Barnette and Isabelle Barnette and the former receivers of the said Washington-Alaska Bank as to all of the matters and things [999] charged in the complaint, and that there was a complete settlement between said parties and a release of the said Barnette of all the matters and things charged against him in the complaint by reason thereof; and also contains all of the evidence, testimony and exhibits introduced and given upon the trial of said cause in support of and against the further separate and affirmative defense of the defendants, wherein it is alleged that the said E. T. Barnette and Isabelle Barnette have fully paid and satisfied all of the wrongs and things charged against these defendants in the complaint, as well as all of the proceedings therein not of record in relation to said above specified matters, and is in all respects true and correct.

NOW, THEREFORE, on motion, IT IS HEREBY ORDERED, that the foregoing pages from one to —— be, and the same is hereby approved, allowed and settled as the Bill of Exceptions in the above-entitled cause and made a part of the record herein; and that the same has been filed and presented within the time allowed by the orders of this Court.

Dated at Iditarod, Alaska, this 6th day of July, A. D. 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 2, page 24, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 24, at Fairbanks.

Service of Copy of foregoing Order Settling Bill of Exceptions acknowledged.

O. L. RIDER,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. **[1000]**

[Title of Court and Cause.]

Assignments of Error.

Comes now the above-named defendants John A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn, and file the following assignments of error upon which they will rely on their appeal from the decree made by this honorable Court upon the 15th day of June, 1914, in the above-entitled cause:

1.

The Court erred in overruling the motion of the defendants R. C. Wood, James W. Hill and John L. McGinn to strike from the files and records of this court and out of the case the complaint filed by the plaintiff herein, for the reason that said complaint

contained more than one cause of action, and that the same were not separately pleaded.

2.

The Court erred in overruling the motions of said defendants to strike certain parts and portions of said complaint.

3.

The Court erred in overruling the demurrers of the defendants to the amended complaint. [1001]

4.

The Court erred in sustaining the demurrer of the plaintiff to the first further and separate answer of the defendants Wood, McGinn and Healey.

5.

The Court erred in refusing to make the finding of fact set forth in paragraph XVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That during all the negotiations heretofore mentioned the defendant R. C. Wood was not in Alaska, and was either in the State of California or the State of Washington. That said Wood's name was signed to the original subscription list, without his knowledge, by E. T. Barnette, and with the understanding of all the subscribers that it was optional with the said R. C. Wood on his return to Fairbanks, Alaska, to elect either to take stock in the new corporation or to receive money for the amount of stock to which he was entitled in lieu thereof."

The Court erred in refusing to make the finding of fact set forth in paragraph XVII of defendants' pro-

posed findings of fact and conclusions of law, as follows:

That in accordance with the directions of the board of directors made upon the 12th day of March, 1908, to the executive committee, the executive committee proceeded to have the necessary papers and transfers made out conveying the property of the partnership to the corporation on the terms stated in the resolutions of January 5, 1908, and requested that the then attorneys of the bank prepare the necessary papers for that purpose. That in compliance with said request, the said attorneys undertook to draw up an agreement stating the true terms and conditions of said sale and transfer which is the agreement attached to plaintiff's said amended complaint and marked exhibit 1. That said agreement, through the mutual mistake of the partners and corporation, and without the fault of either, failed to set forth truly all the terms and conditions of the agreement between said Fairbanks Banking Company, a copartnership, and the corporation, in this: first, that said agreement failed to reserve to said copartners the accrued interest on all loans in existence on the 12th day of December, 1907, up to the 15th day of March, 1908, and second, in that it failed to embody the option given to said James W. Hill and R. C. Wood either to take stock for their portion of the surplus property of the partnership, or to take money, and that in the event of their desire to take money that the amount

should be paid to them not later than July 1, 1908.

The Court erred in refusing to make the finding of fact set forth in paragraph XVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That, with said exceptions, said agreement attached to plaintiff's amended complaint and marked exhibit 1 fully sets forth the [1002] terms and conditions agreed on and entered into between the Fairbanks Banking Company, a copartnership, and the corporation.

8.

The Court erred in refusing to make the finding of fact set forth in paragraph XIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the value placed upon said assets of the partnership was the value placed thereon by the stockholders, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for the purposes of the transfer, and not that the directors should exercise their individual judgment in determining the value of such assets.

9.

The Court erred in refusing to make findings of fact set forth in paragraph XX of defendants' proposed findings of fact and conclusions of law, as follows:

That in accordance with the true agreement had between the copartnership and the corporation, the Fairbanks Banking Company, a corporation, issued to E. T. Barnette 260 shares of the capital stock of said corporation, and to James W. Hill 130 shares thereof, but no stock was ever issued or delivered to said R. C. Wood. That said R. C. Wood returned to Fairbanks, Alaska, on or about the 14th day of April, 1908, and at once notified the said corporation of his election to take money in lieu of stock, and at said time, and after reading said agreement of March 16, 1908, being exhibit 1 attached to plaintiff's amended complaint, refused to sign the same for the reason that in said agreement it set forth that he had subscribed for stock. That at said time it was agreed between the said R. C. Wood and the said corporation that he should have the right to take cash instead of stock up to July 1, 1908, and at said time there was shown to said Wood by said corporation the report of the committee of January 5, 1908, and the minutes of the corporation of March 12, 1908.

10.

The Court erred in refusing to make the finding of fact set forth in paragraph XXI of defendants' proposed findings of fact and conclusions of law, as follows:

That said Wood signed the said agreement of March 16, 1908, marked exhibit 1 attached to plaintiff's amended complaint, with the distinct understanding on his part, and of the Fairbanks

Banking Company, a corporation, that said report and minutes reserved to him the right to take money in lieu of stock; that it was never contemplated or understood by the said R. C. Wood or by the said corporation that by signing said agreement he would waive any right to take money in lieu of his stock. [1003]

11.

The Court erred in refusing to make the finding of fact set forth in paragraph XXII of defendants' proposed findings of fact and conclusions of law, as follows:

That said Wood on or about the 17th day of April, 1908, entered upon his duties as cashier of said corporation and continued as such cashier up until the 29th day of June, 1908.

12.

The Court erred in refusing to make the finding of fact set forth in paragraph XXIII of defendants' proposed findings of fact and conclusions of law, as follows:

That the board of directors and officers of said banks, in paying the money to said R. C. Wood, merely carried out the terms of the agreement entered into between said Wood and said corporation.

13.

The Court erred in refusing to make the finding of fact set forth in paragraph XXIV of defendants' proposed findings of fact and conclusions of law, as follows:

That the said sum of $39,642.81 placed to the

credit of said copartnership on the books of the corporation on March 23, 1908, and thereafter, and upon the 31st day of December, 1908, paid to said partners, was done in accordance with the terms of the agreement made and entered into between the copartnership and the proposed incorporators on January 6, 1908, save and except that the time thereof was subsequently extended by the board of directors from the 15th day of February, 1908, to the 15th day of March, 1908.

14.

The Court erred in refusing to make the finding of fact set forth in paragraph XXVI of defendants' proposed findings of fact and conclusions of law, as follows:

That said directors of said corporation, in taking over the assets and liabilities of said copartnership, acted in good faith and after careful inquiry and investigation had been made to determine the actual value of the assets of said copartnership.

15.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 18th day of September, 1908, Oscar Goetz was the owner of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said

board of [1004] directors, and without their fault, and in violation of the resolutions hereinbefore in the preceding paragraph set forth, was cancelled by J. A. Jackson, assistant cashier of said bank, and the sum of $1,000 paid to said Goetz out of the funds of said bank, and said stock debited to treasury stock.

16.

The Court erred in refusing to make finding of fact set forth in paragraph XXXIV of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 18th day of September, 1909, the said J. A. Jackson, assistant cashier, without the knowledge, consent, approval, or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive committee, debited treasury stock with the amount of G. A. Vedine's stock $500.

That at said itme the said Vedine's name did not appear as a stockholder in the books of said bank, nor had any stock been issued to him, nor had he paid any money for or *or* on account of any stock of said bank; and that no money was paid to said Vedine for or on account of said transaction.

17.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXV of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 24th day of October, 1908, B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive committee and board of directors, debited treasury stock on account of McDonnell stock in the sum of $200. That at said time the said McDonnell's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any money whatsoever for or on account of any of the stock of said bank; and that no money was paid to said McDonnell for or on account of said transaction.

18.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXVII of defendants' proposed findings of fact and conclusions of law, as follows:

That upon the 12th day of January, 1909, the said J. A. Jackson, without the knowledge, consent, approval, or acquiescence of the board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolutions, debited treasury stock on account of F. E. Johnson's stock in [1005] the sum of $200. That at said time the said Johnson's name did not appear as a stockholder in the books of said corporation, nor had any stock been issued to him, nor had he paid any moneys for or on account of any stock of said corpora-

tion bank, and no money was paid to said F. E. Johnson for or on account of said transaction.

19.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 9th day of February, 1909, John Clifford, was the owner of two shares of the outstanding capital stock of said corporation, and upon said date the said B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore set forth, cancelled said stock, and debited treasury stock with the sum of $200, and said Dusenbury paid the said Clifford out of the funds of said bank the said sum of $200.

20.

The Court erred in refusing to make the finding of fact set forth in paragraph XLII of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 10th day of June, 1909, Hart & McConnell were the owners of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the consent, knowledge, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, which were

all well known to the officers of said bank, was cancelled by J. A. Jackson, assistant cashier, and the sum of $1000.00 was credited to the deposit account of said Hart & McConnell on the books of said bank, and said stock debited to treasury stock.

21.

The Court erred in refusing to make the finding of fact set forth in paragraph XLIII of defendants' proposed findings of fact and conclusions of law, as follows:

That upon the 21st day of August, 1909, Louis and Oscar Enstrom were the owners of ten shares of the outstanding capital stock of said Fairbanks Banking Company, and upon said date the said stock, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, was cancelled by B. R. Dusenbury, its cashier, and the sum of $1000.00 was placed to the credit of said Louis **[1006]** and Oscar Enstrom on the books of the bank, and said stock debited to treasury stock.

22.

The Court erred in refusing to make the finding of fact set forth in paragraph XLIV of defendants' proposed findings of fact and conclusions of law, as follows:

That in the month of May, 1909, H. B. Parkin, who was the owner of ten shares of the outstanding capital stock of said corporation, sold

his stock to B. R. Dusenbury, cashier, and the said Dusenbury paid therefor the sum of $1000. That said stock was not transferred on the books of said company to said B. R. Dusenbury, but remained on the books in the name of said H. B. Parkin. That thereafter some officer of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, made a memorandum note for the sum of $1000.00 on account of the Parkin stock, to which said memorandum note some officer of said bank signed the name of D. Michie; that thereafter, and on the 28th day of October, 1909, J. A. Jackson, then cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions which had theretofore been adopted by said board of directors, of which the said J. A. Jackson had full knowledge, cancelled the said memorandum note, and debited treasury stock with the sum of $1000.

23.

The Court erred in refusing to make the finding of fact set forth in paragraph XLV of defendants' proposed findings of fact and conclusions of law, as follows:

That upon the 28th day of October, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on

their part, and in violation of the said hereinbefore-mentioned resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Alex Cameron with $100.00 and also debited treasury stock $200.00 on account of Edith McCormick, and also debited treasury stock on account of J. W. McCormick, in the sum of $200. That at said time the said Cameron, and the said McCormicks' names did not appear as stockholders in the stock-books of said corporation, nor had any stock been issued to them, nor had they paid any money whatsoever for or on account of any stock of said bank; and that no money was paid to said Cameron or to said McCormicks for or on account of said transaction.

24.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVI of defendants' proposed findings of fact and conclusions of law, as follows: **[1007]**

That upon the 10th day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore-mentioned resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Francis H. Taylor, in the sum of $500. That at said time the said Francis H. Taylor's name did not appear as a stockholder in any of the books of said

corporation, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Taylor for or on account of said transaction.

25.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVII of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 23d day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of the hereinbefore-mentioned resolutions, debited treasury stock on account of McGowan & Clark stock in the sum of $500. That at said time the said McGowan & Clark's name did not appear as stockholders in the books of said bank, nor had any stock been issued to them, nor had they paid any money for or on account of any of the stock of said corporation; and that no money was paid to said McGowan & Clark for or on account of said transaction.

26.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVIII of defendants' proposed findings of fact and conclusions of law, as follows:

That upon the 18th day of January, 1910, Horton & Dunham were the owners of five

shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore mentioned, was cancelled by J. A. Jackson, cashier, and the same was debited to treasury stock, and the sum of $500 placed to the credit of said Horton & Dunham on the books of said bank. That at said time the said Horton & Dunham were indebted to said Fairbanks Banking Company.

27.

The Court erred in refusing to make the findings of fact set forth in paragraph XLIX of defendants' proposed findings of fact and conclusions of law, as follows:

That for several years prior to the 13th day of October, 1910, the First National Bank of Fairbanks was engaged in the banking business in the town of Fairbanks, and ever since on or about the first day of May, 1910, the principal stockholders of said bank were R. C. Wood and John L. McGinn, and **[1008]** said bank was a competing bank with the Washington-Alaska Bank, formerly the Fairbanks Banking Company, and the competition was extremely keen between said banks.

28.

The Court erred in refusing to make the finding of fact set forth in paragraph LIII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That at the time of the taking over of all of the stock hereinbefore mentioned and in the amended complaint mentioned, the assets of said corporation exceeded its liabilities, and the earnings and net profits on hand greatly exceeded the par value of the stock so surrendered, cancelled and returned to the treasury stock of said corporation.

29.

The Court erred in refusing to make the finding of fact set forth in paragraph LIV of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 21st day of September, 1909, the assets of said corporation, not including the interest which had been earned but not paid and which was not carried as an asset, exceeded the liabilities in the sum of $23,032.03.

30.

The Court erred in refusing to make the finding of fact set forth in paragraph LV of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 28th day of October, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $26,857.68.

31.

The Court erred in refusing to make the finding of

fact set forth in paragraph LVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 10th day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $8,896.75.

32.

The Court erred in refusing to make the finding of fact set forth in paragraph LVII of defendants' proposed findings of fact **[1009]** and conclusions of law as follows:

> That on the 23d day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $29,890.74.

33.

The Court erred in refusing to make the finding of fact set forth in paragraph LVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 18th day of January, 1910, the assets of said corporation, not including interest which had been earned but not paid and which was not included or carried as an asset, exceeded its liabilities in the sum of $11,984.63.

34.

The Court erred in refusing to make the finding of fact set forth in paragraph LIX of defendants' proposed findings of fact and conclusions of law, as follows:

That it has not been shown that the creditors who were existing at the time of the surrender of said stock and the cancellation thereon as hereinbefore set forth have not been paid in full by the Washington-Alaska Bank of Nevada, save and except that on July 1, 1908, were existing creditors, who have not since been paid in full, to the amount of $4,000, and of said sum one-half thereof has since been paid by the receiver.

35.

The Court erred in refusing to make the finding of fact set forth in paragraph LX of defendants' proposed findings of fact and conclusions of law, as follows:

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed that they had a right to purchase and take back the stock of said corporation, and were advised by the attorneys of said bank that they had such right.

36.

The Court erred in refusing to make the finding of fact set forth in paragraph LXI of defendants' proposed findings of fact and conclusions of law, as follows:

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed, and had a right to believe, that the assets of said bank exceeded its liabilities

and there were net profits which greatly exceeded the par value of the stock so surrendered and cancelled. **[1010]**

37.

The Court erred in refusing to make the finding of fact set forth in paragraph LXII of defendants' proposed findings of fact and conclusions of law, as follows:

> That all of said stock so debited to treasury stock was thereafter carried as an asset of the corporation, and it was not intended by said transaction to reduce the capital stock of said corporation or to retire the same; but, on the contrary, it was the intention to reissue the same to others.

38.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIII of defendants' proposed findings of fact and conclusions of law as follows:

> That on the 24th day of March, 1909, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska, in regard to foreign corporations doing business therein filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding capital stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $173,600.

39.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIV of defendants' proposed findings of fact and conclusions of law as follows:

> That on September 14, 1909, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement showed that upon said date the outstanding capital stock of said corporation was of the par value of $172,600.

40.

The Court erred in refusing to make the finding of fact set forth in paragraph LXV of defendants' proposed findings of fact and conclusions of law as follows:

> That on September 10, 1910, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in [1011] regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $169,600.

41.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVI of defendants' proposed findings of fact and conclusions of law as follows:

> That the end of the fiscal year of the Washington-Alaska Bank of Washington, and of the Fairbanks Banking Company, was the 31st day of December of each year, and at said time it had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their officers were bad and uncollectible, and which had not been charged off during said fiscal year.

42.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVII of defendants' proposed findings of fact and conclusions of law as follows:

> That said bad debts due to the bank and so charged off were not, after said time, carried as an asset of said bank; and, after said bad debts had been deducted from the assets, any profits that were shown to exist, after the deduction of all liabilities including outstanding stock, was placed in the undivided profit account, and was carried until the end of the next fiscal year unless a dividend was declared upon the same, or bad debts charged against the same, during the next succeeding fiscal year.

43.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVIII of defendants' proposed findings of fact and conclusions of law as follows:

> That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of the loans and discounts of said bank that he considered bad and uncollectible. That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $8,599.59. That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still **[1012]** remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of $56,106.97.

44.

The Court erred in refusing to make the finding

of fact set forth in paragraph LXIX of defendants' proposed findings of fact and conclusions of law as follows:

> That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

45.

The Court erred in refusing to make the finding of fact set forth in paragraph LXX of defendants' proposed findings of fact and conclusions of law as follows:

> That the said R. C. Wood was a man of high standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the conditions of said Washington-Alaska Bank, and of the securities held by it for loans made by, and due to, said bank.

46.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXI of defendants' proposed findings of fact and conclusions of law as follows:

> That the said R. C. Wood, immediately after his appointment as advisory manager of said banks, prepared a record of all the loans and discounts of said Washington-Alaska Bank and said Fairbanks Banking Company, which said record contained the names of the debtors, the amounts due the said Washington-Alaska Bank

and Fairbanks Banking Company, and a description and the location of all property, real and personal, given to secure the loans made by said banks, which said record ever since the month of May, 1910, has been a record of said Fairbanks Banking Company, and is now in the possession of the receiver thereof.

47.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXII of defendants' proposed findings of fact and conclusions of law as follows:

That said record-book so containing the names of the debtors of said Washington-Alaska Bank and the Fairbanks Banking Company, and a description and location of the properties given to secure said debts, although in the possession of the present receiver from the date of his appointment, was never examined by him, and the securities mentioned and described [1013] in said book, given to secure loans, was not known to him to be in existence.

48.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIII of defendants' proposed findings of fact and conclusions of law as follows:

That at the end of the fiscal year 1909, the said R. C. Wood requested J. A. Jackson, cashier of the Fairbanks Banking Company, to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and

uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $24,-937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of $9,881.78.

49.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIV of defendants' proposed findings of fact and conclusions of law as follows:

That said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank, and the standing of its debtors.

50.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXV of defendants'

proposed findings of fact and conclusions of law as follows:

That at the meeting of the board of directors of said Fairbanks Banking Company held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts heretofore mentioned had been charged off, were presented by the officers of said bank to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed.

That said statement showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of $56,106.97.

That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending December 31, 1909, after deducting all the bad debts, was the sum of $9,881.78. [1014]

51.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXVI of defendants' proposed findings of fact and conclusions of law as follows:

That upon the 12th day of April, 1910, the directors of the Washington-Alaska Bank declared a dividend of $50,000.00.

52.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXVII of defendants' proposed findings of fact and conclusions of law as follows:

> That said dividend of the Washington-Alaska Bank of Washington, to wit, $50,000, was paid to its stockholder the Fairbanks Banking Company, $25,000 of which said sum was ordered by the directors to be placed to the credit of the undivided profit account of said Fairbanks Banking Company, and the other $25,000 was directed to be credited on the amount for which said Fairbanks Banking Company was carrying the stock of said Washington-Alaska Bank.

53.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXVIII of defendants' proposed findings of fact and conclusions of law as follows:

> That after said sum of $25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of said bank at said time amounted to the sum of $34,828.55.

54.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIX of defendants' proposed findings of fact and conclusions of law as follows:

> That at the time of the declaration of said dividend, and after the adding of said sum of $25,000

to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of $34,828.55, and the directors at said time honestly and in good faith believed that the undivided profit of said Fairbanks Banking Company was ths sum of $34,-828.55, and said directors were so advised by the officers of said bank.

55.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXX of defendants' proposed findings of fact and conclusions of law as follows: **[1015]**

That the profit of said Washington-Alaska Bank, Fairbanks Banking Company and First National Bank for the year ending December 31, 1909, was the sum of $131,332.91; and, after charging off bad debts on said three banks to the amount of $42,836.96, the net profits of said three banks for said year was $88,495.95.

56.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXI of defendants' proposed findings of fact and conclusions of law as follows:

That the said Fairbanks Banking Company at the time of the declaration of the dividend was carrying the stock of the Gold Bar Lumber Company for the sum of $341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people

of high standing who were acquainted with said property and the value thereof, had a right to believe that said property was worth said amount.

57.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXII of defendants' proposed findings of fact and conclusions of law as follows:

That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of $27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

58.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIII of defendants' proposed findings of fact and conclusions of law as follows:

That said dividend was declared by said directors of said bank in good faith and in the honest belief, and after the exercise of due care, that the undivided profits of said banks

amounted to the said sum of $34,828.55, and that the values placed upon the assets of said bank was a true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

59.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIV of defendants' proposed findings of fact [1016] and conclusions of law as follows:

That the directors of said bank, in making loans of the funds of said bank, acted carefully, honestly, and after careful inquiry and investigation had been made as to the standing of the borrowers and investigation made of the properties which were offered for security, and that said directors were acquainted with the loans and securities of said bank.

60.

The Court erred in refusing to make the finding of fact set forth in the paragraph LXXXV of defendants' proposed findings of fact and conclusions of law as follows:

That E. T. Barnette, who is jointly charged with these defendants as to all the wrongs complained of in plaintiffs' amended complaint on file herein, was, during the time of all the transactions mentioned in said amended complaint, the president of said Fairbanks Banking Company, afterwards known as the Washington-Alaska Bank, and one of its directors.

61.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVI of defendants' proposed findings of fact and conclusions of law as follows:

> That at the time of the suspension of the Washington-Alaska Bank of Nevada, the said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said bank and with the then receivers of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of any of the matters and things set forth in plaintiff's amended complaint.

62.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVII of defendants' proposed findings of fact and conclusions of law as follows:

> That as a result of said negotiations, and in full satisfaction of all the wrongs complained of in plaintiff's amended complaint, the said E. T. Barnette on the 18th day of March, 1911, executed an instrument in writing in which he admitted his liability to the creditors and depositors of said bank, and promised and agreed to pay all of the depositors of said bank in full not later than the 18th day of November, 1914, together with interest on all amounts due to

creditors and depositors from the 4th day of January, 1911, until paid.

63.

The Court erred in refusing to make the finding of fact set [1017] forth in paragraph LXXXVIII of defendants' proposed findings of fact and conclusions of law as follows:

> That Isabelle Barnette was and is the wife of the said E. T. Barnette, and the said Isabelle Barnette was desirous of aiding her said husband in the payment of the creditors and depositors of said Washington-Alaska Bank of Nevada, and to that end joined her said husband in the promise to pay all the depositors and creditors of said Washington-Alaska Bank of Nevada on the terms set forth in the preceding paragraph.

64.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIX of defendants' proposed findings of fact and conclusions of law as follows:

> That said promise was made upon the distinct understanding that no litigation would be instituted against the said E. T. Barnette, or others for or on account of any of the matters and things set forth in the amended complaint, and for this purpose, and to prevent any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said Isabelle Barnette and E. T. Barnette on the 18th day of March, 1911,

with the knowledge and consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers by order of this Court accepted the conveyance of title to an improved plantation containing 18,723 acres of land, situate in the Republic of Mexico, and certain improved and income producing business properties and lots situate in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situate in the Fairbanks Precinct, Territory of Alaska; all of which properties belonged at the time of said conveyance to said E. T. Barnette and Isabelle Barnette.

65.

The Court erred in refusing to make the finding of fact set forth in paragraph XC of defendants' proposed findings of fact and conclusions of law as follows:

That the property so conveyed by the said E. T. Barnette and Isabelle Barnette situated in the Republic of Mexico was, at the time of said conveyance, of the value of $500,000.00. That at this time, owing to the unsettled conditions in the Republic of Mexico caused by rebellion and open warfare, it is difficult to determine what is the present value of said property situate in said Republic of Mexico, which said property is of great value, but the market value thereof cannot be determined at this time.

66.

The Court erred in refusing to make the finding

of fact set forth in paragraph XCI of defendants' proposed findings of fact and conclusions of law as follows: [1018]

> That the property conveyed by the said E. T. Barnette and Isabelle Barnette in the town of Fairbanks, Territory of Alaska, is of the value of $25,000.

67.

The Court erred in refusing to make the finding of fact set forth in paragraph XCII of defendants' proposed findings of fact and conclusions of law as follows:

> That the value of the interest of the said E. T. Barnette and Isabelle Barnette in association placer mining claims situate in the Fairbanks Recording District, Territory of Alaska, and conveyed by them to said receivers, is the value of $20,000.

68.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIII of defendants' proposed findings of fact and conclusions of law as follows:

> That the receiver has received from said mining properties and said town properties as rents, royalties and proceeds, up to the present time, the sum of $31,400.

69.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIV of defendants' proposed findings of fact and conclusions of law as follows:

That in said deed of said property in the Republic of Mexico it is expressly provided that said receiver may sell all or any part of said land at private sale on or after the 18th day of November, 1914, for the purpose of raising funds with which to pay the claims of the depositors and creditors of said bank then remaining unpaid, and, out of the proceeds thereof, said receiver is directed to pay all the claims of depositors and creditors of said bank then remaining unpaid.

70.

The Court erred in refusing to make the finding of fact set forth in paragraph XCV of defendants' proposed findings of fact and conclusions of law as follows:

That in said deed E. T. Barnette and Isabelle Barnette further authorize and empower said receiver to collect and receive the amount of $226,025 payable on the 18th day of November, 1914, in case of an option given on the 18th day of November, 1909, for the purchase of forty-nine per cent of said property situate in the Republic of Mexico, is exercised by the optionees mentioned in said option by that time, and to apply such sum to the payment of said claims of depositors and creditors of said bank. [1019]

71.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVI of defendants'

proposed findings of fact and conclusions of law as follows:

> That said deed to property in the Territory of Alaska also provides for and gives said receiver power to collect and receive all the rents, royalties and proceeds of the property therein described, and to sell said property and to apply the amount so received in payment of said claims of depositors and creditors of said bank at any time when it shall be deemed most advisable to do so by the said E. T. Barnette and Isabelle Barnette and the receiver; but that if said property is not so sold by the 18th day of November, 1914, that said receiver is then authorized to sell said property without the consent of said E. T. Barnette and Isabelle Barnette and to apply the amount so received in payment of the claims of the creditors and depositors of said Washington-Alaska Bank of Nevada.

72.

The Court erred in refusing to make the findings of fact set forth in paragraph XCVII of defendants' proposed findings of fact and conclusions of law as follows:

> That the said receiver holds a large amount of property belonging to said bank, which is of great value and has not been converted into money; and the property so held by him, and the property so conveyed to the receiver by the said E. T. Barnette and Isabelle Barnette, are more than sufficient to satisfy all the claims, demands and obligations of whatsoever nature now

existing against said Washington-Alaska Bank of Nevada.

73.

The Court erred in refusing to make the findings of fact set forth in paragraph XCVIII of defendants' proposed findings of fact and conclusions of law as follows:

> That the receiver has received as rents, royalties and profits from the property of the said E. T. Barnette and Isabelle Barnette situate in the Territory of Alaska, the sum of $31,400.00, and that said amount, together with the property conveyed by the said E. T. Barnette and Isabelle Barnette, exclusive of the property situate in said Republic of Mexico, are more than ample to pay all the matters and things charged against these defendants in said amended complaint of plaintiff herein; and that all the wrongs and things charged against these defendants in said amended complaint have, by reason thereof, been fully satisfied and paid.

74.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIX of defendants' proposed findings of fact and conclusions of law as follows: [1020]

> That the then receivers of the said Washington-Alaska Bank agreed to accept in full satisfaction of all the matters and things set forth in plaintiff's amended complaint and sued on herein, the said promises and property of the said E. T. Barnette and Isabelle Barnette, and the

said E. T. Barnette and Isabelle Barnette made and executed said promises and conveyed said property, in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the said Washington-Alaska Bank of Nevada, and in full satisfaction of all the matters and things set forth in plaintiff's amended complaint; and the said receivers accepted and received said promises and said property in full satisfaction of all claims and causes of action set forth in the amended complaint of the plaintiff herein.

75.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph 2 of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the payment of said sum of $13,000 to R. C. Wood by said corporation was done in accordance with the true terms of the agreement entered into between the said R. C. Wood and the said Fairbanks Banking Company, a corporation.

76.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph III of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the sum of $39,642.81 paid to said E. T. Barnette, R. C. Wood and James W. Hill for interest on loans that were existing December

12, 1907, up to March 15, 1908, was in accordance with the true intent and spirit of the agreement entered into between the stockholders of said Fairbanks Banking Company, a corporation, and the said copartners, and the said board of directors, in allowing interest as aforesaid, carried out the true intent and spirit of the agreement entered into between the said stockholders and the said copartners.

77.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph IV of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the stock that was surrendered, and taken back by the directors, and of which said directors had knowledge, was taken honestly and in good faith and under the belief of the said directors that they had a right to take back said stock, and that the same was for the best interest of the corporation.

78.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph V of defendants' proposed findings [1021] of fact and conclusions of law, which is as follows:

That the balance of the stock so surrendered, and taken back by the officers of said bank, was done with the knowledge, consent, approval or acquiescence of said directors, and there was nothing to charge the said directors with knowledge that its officers were violating the resolu-

tions of the said board of directors not to take back or cancel any stock.

79.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph VI of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the declaration of the dividend by the directors was done by them honestly and in good faith and under the honest belief that the assets of said corporation exceeded it's liabilities in the sum of $34,828.55, and that there was not profits to said amount and that said directors believed at said time that the assets were of the value that said corporation was carrying them.

80.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph VIII of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the directors of said bank had a right to rely upon the honesty and fidelity of their officers, and are not chargeable with any acts that said officers did in violation of the instructions of said board of directors.

81.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph IX of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the allegations of plaintiff's amended complaint are untrue, and the allegations of the

defendants' answers are true.

82.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph X of defendants' proposed findings of fact and conclusions of law, and which is as follows:

> That the plaintiff is not entitled to recover any judgment whatsoever against any of the defendants Jesson, Heill, Wood, Brumbaugh, McGinn, Peoples, Clark, Healey and Preston, or either of them.

83.

The Court erred in refusing to find as a conclusion of law [1022] what is set forth in paragraph XI of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the defendants are entitled to a decree that the plaintiff recover nothing by this action, and that defendants have judgment for their costs and disbursements.

84.

The Court erred in overruling the defendants' objections to the finding of fact number II of the findings of fact signed and filed in this cause, and in making the same, which is as follows:

> That said bank commenced business in the town of Fairbanks, Alaska, on the 16 day of March, 1908, with a subscribed capital of $206,000.00, part of which was paid in cash, part in property, and the balance by promissory notes of the subscribers.

85.

The Court erred in overruling the defendants' objections to the finding of fact number III of the findings of fact signed and filed in this cause, and in making the same, which is as follows:

> That prior to the 21 day of January, 1908, subscriptions for said capital stock were circulated and the following persons, among others, subscribed for shares thereof, to wit: E. T. Barnette, 440 shares, R. C. Wood, 220 shares, James W. Hill, 220 shares, the name of R. C. Wood be-in subscribed thereto by said E. T. Barnette.

86.

The Court erred in overruling the defendants' objections to that portion of paragraph XIII of the findings of fact signed and filed in said cause, and in making the same, wherein it is stated that the said Wood, together with other subscribers, were declared to be stockholders of said corporation; and also to that portion thereof wherein it is stated that the said Wood was notified of the result of said meeting of stockholders by the defendant Hill.

87.

The Court erred in overruling the defendants' objections to that portion of finding of fact numbered XIV made and filed in this cause, and in making the same, wherein it is stated that said R. C. Wood, at the time said agreement was signed, was the cashier of said bank. [1023]

88.

The Court erred in overruling defendants' objections to that portion of paragraph XV of the findings

of fact made and filed in this cause, and in mailing the same, wherein it is stated that upon the 16th day of March, 1908, a written agreement was entered into between said corporation and said partners, in which said agreement the said Wood agreed to accept stock of the corporation at its par value for the amount of the assets in excess of said liabilities.

89.

The Court erred in overruling defendants' objection to that portion of paragraph XVI of the findings of fact made and filed in this cause, and in mailing the same, wherein it is stated that the said Wood was its cashier.

90.

The Court erred in overruling defendants' objections to that portion of findings numbered XIX so made and filed in this cause, and in mailing the same, wherein it is stated that said Wood was fully advised concerning the same by the defendant Hill by letter and telegram.

91.

The Court *errs* in overruling defendants' objections to finding of fact numbered XX so made and filed in this cause, and in making the same, which is as follows:

> That prior to the return of said Wood to Fairbanks, to wit; on the 29th day of February, 1908, he offered to sell his stock in said corporation and to take in payment therefor part cash and a note for the balance, to be secured by said stock as collateral security.

92.

The Court erred in overruling the defendants' ob-

jections to finding of fact numbered XXII so made and filed in this cause, and in making the same, which is as follows:

> That of the loans and discounts transferred by said partnership to said corporation, a large amount were then past due, of which then past due paper the sum of $69,908.94 now remains in the hands of the receiver unpaid and uncollectible, which said loans and discounts were accepted by the directors of said corporation at their face value, and the same were included **[1024]** in those on which the accrued interest referred to in said resolution was afterwards computed.

93.

The Court erred in overruling the defendants' objections to finding of fact numbered XXIII so made and filed in this cause, and in making the same, which is as follows:

> That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of $27,997.38, which depended for their value upon the existence of an alleged guaranty of the Scandinavian American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said board of directors, and said repudiation was known to the members of said board. That said notes are still unpaid,

and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of $27,997.38.

94.

The Court erred in overruling the defendants' objections to finding of fact numbered XXIV so made and filed in this cause, and in making the same, which is as follows:

That said board of directors and the officers of said bank accepted said notes of the Tanana Electric Company and paid therefor the sum of $27,997.38, with knowledge on the part of each of them that the same depended for their value upon said alleged guaranty alone.

95.

The Court erred in overruling defendants' objections to finding of fact numbered XXIX so made and filed in this cause, and in making the same, which is as follows:

That a certificate for 130 shares of the capital stock of said corporation had been written up in the name of the defendant Wood, of the par value of $13,000, but the same was never detached from the stock-book. That said 130 shares were carried on the books of said bank as outstanding stock from March 16, 1908, to June 30, 1908.

96.

The Court erred in overruling the defendants' objection to finding of fact numbered XXX so made and filed in this cause, and in making the same, which is as follows:

That on the 30 day of June, 1908, with the knowledge, consent and approval of the officers and directors of said bank, a [1025] certificate of deposit was issued to and accepted by the said Wood in the sum of $13,000, in lieu of said stock, which said certificate was signed by the said B. R. Dusenbury as assistant cashier prior to when the said resignation of the said Wood as cashier became effective, and said shares of capital stock were on the same day charged to treasury stock on the books of said bank.

97.

The Court erred in overruling the defendants' objections to that portion of paragraph XXXIV of the findings of fact signed and filed in this cause, and in making the same, wherein it is stated that at the time said certificate of deposit was issued to said Wood he was cashier and a member of the executive committee; said finding of fact being as follows:

That at the time the said certificate of deposit was issued to said Wood, and his shares of stock so charged to treasury stock as aforesaid, the following of the defendants now before the court in this action were among its officers, to wit, James W. Hill, a member of the executive committee, and its vice-president, John A. Jesson, a member of the board of directors, R. C. Wood, cashier, and a member of its executive committee; and, at said meeting of July 13, 1908, at the time said report was submitted and the

sense of said meeting was expressed as aforesaid, the said John A. Jesson was present and participated therein as a member of the board of directors, and the said James W. Hill was also present as its vice-president and a member of the executive committee.

98.

The Court erred in overruling the defendants' objections to finding of fact numbered XXXV of the findings of fact signed and filed in this case, and in making the same, which is as follows:

That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as "doubtful account" the sum of $22,979.99, and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to wit, $22,979.99, all of which said notes were then past due, and of which there still remain unpaid and uncollectible the sum of $12,880.61. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of $12,-192.80 **[1026]**

99.

The Court erred in overruling the defendants' ob-

jections to finding of fact numbered XXXVII so made and filed in this cause, and in making the same, which is as follows:

> That of said interest so paid to said Barnette, Hill and Wood, as aforesaid, approximately $7500.00 thereof was never collected by said bank.

100.

The Court erred in overruling the defendants' objections to finding of fact numbered XXXVIII so made and filed in this cause, and in making the same, which is as follows:

> That at the time said resolution allowing said interest was adopted, and at the time the amount thereof as aforesaid was placed to the credit of said Barnette, Hill and Wood as aforesaid, in the books of the said bank, the following defendants now before the court in this action were officers of said bank, to wit, John A. Jesson, member of the board of directors, James W. Hill, member of the executive committee and vice-president, and R. C. Wood, cashier.

101.

The Court erred in overruling the defendants' objections to finding of fact numbered XL so made and filed in this cause, and in making the same, which is as follows:

> That at the time said investment was so made as aforesaid, said lumber company was closed down, and immediately prior to closing down, it had been operated at a loss; that is so far as said lumber company was able to operate

since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best assets exhausted. That no dividends have ever been paid on the capital stock of said lumber company during the time the same was owned by said bank.

102.

The Court erred in overruling the defendants' objections to that portion of paragraph LI of the findings of fact made and filed in said cause, and in making the same, which is as follows:

That said bank had no surplus or undivided profits against which the same could be charged.

103.

The Court erred in overruling the defendants' objections to paragraph LII of the findings of fact so made and filed in said cause, and in making the same, which is as follows: [1027]

That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized.

104.

The Court erred in overruling the defendants' objections to finding of fact numbered LIV so made and filed in this cause, and in making the same, which is as follows:

That said stock surrenders so made as afore-

said were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.

105.

The Court erred in overruling the defendants' objections to finding of fact numbered LVII so made and filed in this cause, and in making the same, which is as follows:

That the time the said capital stock of said Washington-Alaska Bank of Washington was so purchased, the defendants J. A. Jesson, James W. Hill and John L. McGinn were members of the board of directors of the Fairbanks Banking Company; and said purchase of said capital stock was ratified and confirmed by them as members of the said board on the said 14 day of September, 1909.

106.

The Court erred in overruling the defendants' objections to finding of fact numbered LVIII so made and filed in this cause, and in making the same, which is as follows:

That at the time the aforesaid resolution was adopted by the said board of directors to take over the business and affairs of said partnership, and at the time said written agreement between said corporation and said partners was entered into and confirmed and approved, and at the time said valuation was placed on said capital stock of the Gold Ba*d* Lumber Company and said stock accepted at such valuation, and at the time said past due notes held by said partners were

accepted and paid for by said corporation, including said notes which had been charged to the doubtful account of said partnership as aforesaid, and at the time said accrued interest on said notes so purchased of said partnership was computed and allowed to said partners and placed to their credit as aforesaid on the books of said corporation, the following defendants now before the Court in this action were officers and directors of said corporation and acquiesced in said transactions and gave their consent thereto with full knowledge on the part of each of them of the existence of the facts heretofore found respecting such transactions, to wit: James W. Hill, vice-president and member of its executive committee, John A. Jesson, member of its board of directors, R. C. Wood, the cashier. That the said Hill and Wood were also members of the partnership with which said corporation contracted respecting said matters and were each personally interested therein adversely to said corporation. [1028]

107.

The Court erred in overruling the defendants' objections to finding of fact numbered LXI so made and filed in this cause, and in making the same, which is as follows:

That at the time said dividend was so declared and paid, the Fairbanks Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid.

108.

The Court erred in overruling the defendants' ob-

jections to finding of fact numbered LXII so made and filed in this cause, and in making the same, which is as follows:

> That said dividend was declared and paid in violation of the laws of the States of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

109.

The Court erred in overruling the defendants' objections to finding of fact numbered LXVI so made and filed in this cause, and in making the same, which is as follows:

> That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities, and the amount of such liabilities is more than $470,000 in excess of the value of said assets.

110.

The Court erred in overruling the defendants' objections to conclusion of law numbered I of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Wood, McGinn, Brumbaugh and Jesson are jointly and severally liable in the sum of $33,720.00 by reason of the declaration and payment of the dividend upon the capital stock of the Fairbanks Banking Company on April 12, 1910.

111.

The Court erred in overruling the defendants' objections to conclusion of law numbered 2 of the con-

clusions of law signed and filed in this cause, and in making the same, which is as follows:

That the defendant Jesson is liable in the sum of $13,400.00 by reason of the surrender of shares of capital stock of said company, made between July 13, 1908, and September 12, 1908.

112.

The Court erred in overruling the defendants' objections to [1029] conclusion of law numbered 3 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That the defendants Jesson and Hill are jointly and severally liable in the sum of $1,500.00 for surrender of shares of capital stock of said company made between September 13, 1908, and October 13, 1908.

113.

The Court erred in overruling the defendants' objections to conclusion of law numbered 4 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That the defendants Jesson, Hill and Peoples are jointly and severally liable in the sum of $1,100.00 for surrenders of shares of capital stock, made between October 14, 1908, and March 13, 1909.

114.

The Court erred in overruling the defendants' objections to conclusion of law numbered 5 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That the defendants Jesson, Hill and Brum-

baugh are jointly and severally liable in the sum of $1,000.00 for surrenders of capital stock of said company made between March 14, 1909, and September 12, 1909.

115.

The Court erred in overruling the defendants' objections to conclusion of law numbered 6 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That defendants Jesson, Brumbaugh and McGinn are jointly and severally liable in the sum of $3,000.00 for surrenders of capital stock of said company, made between September 13, 1909, and October 12, 1909.

116.

The Court erred in overruling the defendants' objections to conclusions of law numbered 7 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

That defendants Jesson, McGinn and Brumbaugh are jointly and severally liable in the sum of $1,000.00 for surrenders of capital stock made between October 13, 1909, and January 18, 1910.

117.

The Court erred in making a conclusion of law as set forth in paragraph 8 of the conclusions of law signed and filed in this cause, which is as follows: [1030]

That the plaintiff is entitled to a decree and judgment against the above-named defendants for the recovery of the sums above mentioned.

118.

The Court erred in making and entering judgment

and decree in favor of the plaintiff and against the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally for the sum of $33,720.00 by reason of the declaration and payment on April 12, 1910, of the dividend upon the capital stock of the Fairbanks Banking Company, set up in the complaint.

119.

The Court erred in rendering and entering a judgment and decree in favor of the plaintiff and against the defendant J. A. Jesson for the sum of $13,400 by reason of the surrender of shares of the capital stock of said company made between July 13, 1908, and September 12, 1908.

120.

The Court erred in making and rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson and James W. Hill, jointly and severally, for the sum of $1,500.00 by reason of the surrender of shares of the capital stock of said company made between September 13, 1908, and October 13, 1908.

121.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants James W. Hill and J. A. Jesson and E. R. Peoples, jointly and severally for the sum of $1,100.00 by reason of the surrender of shares of the capital stock of said company made between October 14, 1908, and March 13, 1909.

122.

The Court erred in making, rendering and enter-

ing a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, [1031] for the sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company made between March 14, 1909, and September 12, 1909.

123.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, for the sum of $3,000.00 by reason of the surrender of shares of capital stock of said company made between September 13, 1909, and October 12, 1909.

124.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants John A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, for the sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company, made between October 13, 1909, and January 18, 1910.

125.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh, and James W. Hill, to the effect that plaintiff recover the costs of and from said defendants.

126.

The Court erred in making, rendering and enter-

ing a decree to the effect that execution issue for the enforcement of the above judgments and decrees against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

127.

The Court erred in not making, rendering and entering a decree in favor of defendants and against the plaintiff to the effect that the plaintiff take nothing in this action, and that the defendants recover their costs and disbursements. [1032]

128.

The Court erred in refusing to make a finding that all the matters and things charged in the complaint were fully compromised and settled by the accord and satisfaction that was entered into between E. T. Barnette and Isabelle Barnette, and the former receivers of said corporation.

129.

The Court erred in finding that the defendants Wood, Brumbaugh, J. A. Jesson and McGinn, as directors, were liable for the declaration of the dividend of the 12th day of April, 1910.

130.

The Court erred in finding that these defendants were liable for the stock taken back by said corporation, as set forth in the findings of fact.

131.

The Court erred in failing to make a finding of fact to the effect that all the wrongs charged in the complaint have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

132.

The Court in failing to make a finding of fact to the effect that all the matters and things found against these defendants have been fully satisfied and paid by the said E. T. Barnette and Isabelle Barnette.

128.

WHEREFORE defendants pray that the judgment and decree of said Court be vacated and set aside, and that judgment and decree be entered in favor of defendants to the effect that plaintiff recover nothing by this action and that said defendants recover their costs and disbursements; and that they have such other and further relief as in accordance with the law they are entitled to receive.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Said Defendants.

Service of the foregoing Assignments of Error is hereby acknowledged at Fairbanks, Alaska, this 6th day of July, 1914, by receipt of a true copy thereof.

O. L. RIDER,
Attorney for Plaintiff. [1033]

[Endorsed]: No. 1756. District Court 4 Division, Territory of Alaska. F. G. Noyes, Receiver, vs. J. A. Jesson et al. Assignments of Error. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. [1034]

[Title of Court and Cause.]

Petition for Allowance of Appeal, and Order Granting Same.

The above-named defendants John A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood, and John L. McGinn, conceiving themselves aggrieved by the order, judgment and decree made and entered in the above-entitled court and cause on the 15th day of June, 1914, wherein it was adjudged and decreed;

That the plaintiff have and recover of and from the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally the sum of $33,720.00 by reason of the declaration and payment on April 12th, 1910, of the dividend upon the capital stock of the Fairbanks Banking Company set up in the complaint;

That the plaintiff have and recover of and from the defendant J. A. Jesson the further sum of $13,400.00 by reason of the surrender of shares of the capital stock of said company made between July 13, 1908 and September 12, 1909;

That the plaintiff have and recover of and from the defendants J. A. Jesson and James W. Hill, jointly and severally the further sum of $1,500.00 by reason of the surrender of shares of the capital stock of said company made between September 13, 1908 and October 13, 1908; [1035]

That the plaintiff have and recover of and from the defendants J. A. Jesson, James W. Hill and E. R.

Peoples, jointly and severally, the further sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company made between October 14, 1908 and March 13, 1909;

That the plaintiff have and recover of and from the defendants J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, the further sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company made between March 14, 1909 and September 12, 1909;

That the plaintiff have and recover of and from the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, the further sum of $3,000.00 by reason of the surrender of shares of the capital stock of said company made between the 13th day of September, 1909, and the 12th day of October, 1909;

That the plaintiff have and recover of and from the defendants J. A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, the further sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company made between October 13, 1909, and January 18, 1910;

All of which is finally ordered adjudged and decreed at the cost of the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill;

Do hereby appeal from said order, judgment and decree made and entered on the 15th day of June, 1914, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herein; and they pray that

this appeal may be allowed; and that the transcript of the record, papers and proceedings upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; [1036] and they pray that the Court fix the amount of the security which the defendant E. R. Peoples shall give and furnish upon such appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed as against the said E. R. Peoples until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit; and that the Court also make an order fixing the amount of security which the defendants Wood and McGinn shall give and furnish upon such appeal, and that, upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit; and that as to the other defendants, the Court fix the amount of the cost bond on appeal.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Said Defendants.

Service of the foregoing Petition for allowance of an appeal is hereby admitted at Fairbanks, Alaska, this 6th day of July, 1914, by receipt of a copy thereof.

O. L. RIDER,
Attorney for Plaintiff.

The foregoing Petition on Appeal is granted. Done in open Court this 6th day of July, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 2 page 26, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 2.

[Endorsed]: No. 1756 District Court, 4 Division Territory of Alaska, F. G. Noyes, Receiver, vs. J. A. Jesson, et al. Petition on Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914, Angus McBride, Clerk. [1037]

That at a stated term, to wit, at the Special July, 1914, term of the District Court of the Territory of Alaska, Fourth Judicial Division, held at the courtroom in the Town of Iditarod, Territory of Alaska, in said Fourth Division, on the 6th day of July, 1914, present the Honorable F. E. FULLER, Judge of the District Court for the Territory of Alaska, Fourth Judicial Division, sitting in equity:

[Title of Cause.]

Order Allowing Appeal [and Fixing Amount of Bond].

On motion of Messrs. McGowan & Clark, A. R. Heilig and John L. McGinn, attorneys for the defendants John A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn.

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, from the final decree heretofore filed and entered herein be, and the same hereby is, allowed; and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals.

IT IS FURTHER ORDERED that the bond on appeal as to the defendant E. R. Peoples be fixed at the sum of $1800.00 the same to act as a supersedeas bond and also as a bond for costs and damages on appeal; and that as to the defendants Wood and McGinn the bond on appeal be fixed at the sum of $45,000.00 the same to act as a supersedeas bond and also as a bond for costs and damages on appeal; and that as to the other defendants, the cost [1038] bond on appeal be fixed in the sum of $500.00 the same being included in the amount of the bond that is to be given by the said defendants Peoples, Wood and McGinn.

Dated at Iditarod Fourth Judicial Division, Territory of Alaska, this 6th day of July, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 2, page 26, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 3.

Service of the within and foregoing order allowing appeal acknowledged at Iditarod, Alaska, this—— day of —— 1914 by receipt of a true copy thereof.

O. L. RIDER,
Attorney for Plaintiff.

[Endorsed]: No. 1756 District Court, 4 Division, Territory of Alaska. F. G. Noyes, Receiver, vs. J. A. Jesson et al., Order Allowing Appeal. Filed in the District Court, Territory of Alaska, 4th Div. July 6, 1914. Angus McBride, Clerk. [1039]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, John A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn, as principals, and Thomas P. Aitken and Henry Riley and J. J. Price, as sureties, are held and firmly bound unto F. G. Noyes, as receiver of the Washington-Alaska Bank, a corporation, the plaintiff herein, in the full sum of forty-five thousand & no/100 ($45,000.00) dollars, to be paid to said F. G. Noyes, as receiver of said Washington-Alaska Bank, a corporation plaintiff, herein, his attorneys, executors, administrators, assigns, successor or successors, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of July, 1914.

WHEREAS lately at a term of the District Court for the Territory of Alaska, Fourth Division, in a suit pending in said court between F. G. Noyes, receiver of the Washington-Alaska Bank, a corporation organized under the laws of the State of Nevada, as plaintiff, and J. A. Jesson, D. H. Jonas, David

Yarnell, Dan Ryan, [1040] John L. McGinn, R. C. Wood, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenbury and L. N. Jesson, as defendants, a decree was rendered against the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally, for the sum of $33,720.00 and costs; against the defendants J. A. Jesson for the further sum of $13,400.00 and costs; against the defendants J. A. Jesson and James W. Hill, jointly and severally, for the further sum of $1500.00 and costs; against the defendants J. A. Jesson, James W. Hill and E. R. Peoples, jointly and severally, for the further sum of $1000.00 and costs, against the defendants J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, for the further sum of $1000.00 and costs; against the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, for the further sum of $3,000.00 and costs; and against the defendants J. A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, for the further sum of $1000.00 and costs;

And said defendants J. A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn, have obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit; and a citation, directed to the said plaintiff F. G. Noyes, receiver of the Washington-Alaska

Bank, a corporation, is about to be issued, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in San Francisco, California.

AND WHEREAS the above-named defendants Wood and McGinn have obtained an order from said Court that the bond on appeal as to them be fixed in the sum of Forty-five Thousand & No/100 ($45,000.-00) the same to act as a supersedeas bond as to them and also as a bond [1041] for costs and damages on appeal.

Now, the condition of the above obligation is such that if the said Wood and McGinn shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then this obligation is to be void, otherwise to remain in full force and virtue.

R. C. WOOD,
By JOHN L. McGINN,
JOHN L. McGINN,
Principals.
THOMAS P. AITKEN,
HENRY RILEY,
J. J. PRICE,
Sureties.

United States of America,
Territory of Alaska,—ss.

Thomas P. Aitken and Henry Riley & J. J. Price, whose names are subscribed to the above and foregoing undertaking as sureties, being first duly sworn, each for himself doth depose and say: That he is a

resident of the Territory of Alaska; That he is not an attorney or counselor at law, marshal, clerk of any court, or other officer of any court; That he is worth the sum of Forty-five Thousand & No/100 ($45,000.-00) dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

THOMAS P. AITKEN,
HENRY RILEY,
J. J. PRICE.

Subscribed and sworn to before me this 6th day of July, 1914.

[Seal] EDWARD M. STANTON,
A Notary Public for Territory of Alaska.

My commission will expire Jan. 11, 1918.

The sufficiency of the sureties on the foregoing bond approved this 6th day of July, 1914.

F. E. FULLER,
District Judge.

[Endorsed]: No. 1756. District Court, 4 Division, Territory of Alaska, F. G. Noyes, receiver, vs. J. A. Jesson, et al. Bond on Appeal. Filed in the District Court, Territory of Alaska. 4th Div. July 6, 1914. Angus McBride, Clerk. [1042]

[Title of Court and Cause.]

Citation [on Appeal].

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to F. G. Noyes, receiver of the Washington-Alaska Bank, a Corporation.

You are hereby cited and admonished to appear

and be at the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal made and entered in the above-entitled cause in which F. G. Noyes, receiver of the Washington-Alaska Bank, a corporation, is plaintiff and respondent, and J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, John L. McGinn, R. C. Wood, C. J. Robinson, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenbury and L. N. Jesson are defendants and said defendants J. A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn are appellants in said appeal, to show cause, if any there be, why a decree and judgment rendered in said cause in said District Court for the Territory of [1043] Alaska, Fourth Division, against the defendants J. A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn, and each of them, should not be set aside, corrected and reversed, and why speedy justice should not be done to the defendants J. A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States this 6th day of July, One Thousand

Nine Hundred and Fourteen.

F. E. FULLER,

District Judge in and for the Territory of Alaska, Fourth Judicial Division.

[Seal] Attest: ANGUS McBRIDE,

Clerk.

Service of a copy of the within and foregoing Citation admitted this 6th day of July 1914, at Iditarod, Alaska.

O. L. RIDER,

Attorney for Plaintiff and Respondent. [1044]

[Endorsed]: No. 1756. District Court, 4 Division, Territory of Alaska. F. G. Noyes, Receiver, vs. J. A. Jesson et al. Citation. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. By ————, Deputy.

[Title of Court and Cause.]

Order Extending Return Day.

It having been stipulated and agreed by and between the parties hereto through their respective attorneys, that the return day and the time for docketing the appeal and cross appeal in this action may be extended to and including the 1st day of January, 1915, on account of the great distance of Fairbanks, Alaska, from San Francisco, California, and the uncertainty of mail,

NOW, THEREFORE IT IS HEREBY ORDERED that the return day, and the time for docketing said cause be extended to include the first day of January, 1915.

Dated at Iditarod, Alaska, this 6th day of July, 1914.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 2, page 76, at Iditarod, Alaska.

Entered in Court Journal No. 13, page 3.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. [1045]

[Title of Court and Cause.]

Praecipe [to Transcript of Record].

To the Clerk of the Above-entitled Court:

You are hereby directed to make and prepare the record on appeal in the above-entitled cause and have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, by the 1st day of January, 1915; and that, in preparing said transcript, it shall be made up of the following papers:

Amended Complaint;

Motions to strike the Amended Complaint from the files;

Orders denying same;

Motions to strike certain parts and portions of said Amended Complaint;

Orders denying said motions;

Demurrers to the Amended Complaint;

Orders overruling the same;

Answer of the defendants R. C. Wood, John L. McGinn and J. A. Healy.

Plaintiff's demurrer to the first further and separate answer and defense of said answer of defendants Wood, McGinn and Healey;

Order sustaining the same;

Amended Answer of the defendants J. A. Jesson, E. R. Peoples, James W. Hill and Ray Brumbaugh; [1046]

Replies to said Answer;

Findings of Fact and Conclusions of Law;

Judgment and Decree;

Bill of Exceptions;

Order settling Bill of Exceptions;

Assignments of Error;

Petition for Appeal;

Order Allowing Appeal;

Bond on Appeal;

Citation, and admission of service thereon;

Order extending return day and time for docketing said cause;

Stipulation for printing of transcript;

Praecipe for transcript; and

Stipulation as to making up record.

It is further directed that exhibit "B" attached to exhibit 1 of the Amended Complaint may be omitted in the preparation of said transcript.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Defendants Wood, Hill, Peoples, McGinn, Brumbaugh and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1914. Angus McBride, Clerk. P. R. Wagner, Deputy. **[1047]**

[Title of Court and Cause.]

[Stipulation re Transcript of Record.]

It is hereby stipulated between the plaintiff and the defendant by and through their respective attorneys, that the transcript of the record on appeal in the above-entitled cause shall be made up of the following papers:

Amended Complaint;

Motions to strike the Amended Complaint from the files;

Orders denying same;

Motions to strike certain parts and portions of said Amended Complaint;

Orders denying said motions;

Demurrers to the Amended Complaint;

Orders overruling the same;

Answer of the defendants R. C. Wood, John L. McGinn, and J. A. Healey;

Plaintiff's motion to strike the first further and separate answer and defense of said answer of defendants Wood, McGinn and Healey;

Order granting the same;

Amended Answer of the defendants J. A. Jesson, E. R. Peoples, James W. Hill and Ray Brumbaugh;

Replies to said Answers;

Findings of Fact and Conclusions of Law, Judgment and Decree;

Bill of Exceptions;
Order Settling Bill of Exceptions;
Assignment of Errors; **[1048]**
Petition for Appeal;
Order Allowing Appeal;
Bond on Appeal;
Citation, and Admission of service thereon;
Order extending return day and time for docketing said cause;
Stipulation for printing of transcript;
Praecipe for transcript; and
This stipulation as to making up of the record.

It is further stipulated and agreed that Exhibit "B" attached to Exhibit "One" of the Amended Complaint may be omitted in the preparation of said transcript.

Dated at Iditarod, Alaska, this 6th day of July, 1914.

O. L. RIDER,
Attorney for Plaintiff.
McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Defendants Wood, Hill, Peoples, Brumbaugh, McGinn and J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk. **[1049]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court for the Territory of Alaska, Fourth Division.

No. 1756.

F. G. NOYES, Receiver of the Washington-Alaska Bank, a Corporation,

Plaintiff,

vs.

J. A. JESSON, D. H. JONAS, DAVID YARNELL, DAN RYAN, C. J. ROBINSON, JOHN L. McGINN, R. C. WOOD, M. H. McMULLEN, C. E. CLAYPOOL, ROBERT SHEPPARD, HANS STARK, JOHN FLYGAR, JOHN P. ANDERSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, J. A. JACKSON, JOHN A. CLARK, J. A. HEALEY, GEORGE PRESTON, B. R. DUSENBURY and L. N. JESSON,

Defendants.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Angus McBride, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify, that the foregoing, consisting of one thousand forty-nine (1049) typewritten pages, numbered from 1 to 1049 inclusive, constitutes a full, true and correct transcript on appeal in cause No. 1756, entitled:

F. G. Noyes, Receiver of the Washington-Alaska Bank, a Corporation, Plaintiff, vs. J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, C. J. Robinson, John L. McGinn, R. C. Wood, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenbury and L. N. Jesson, Defendants, wherein F. G. Noyes, as Receiver of the Washington-Alaska Bank, a corporation, is Plaintiff and Appellee, and J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, C. J. Robinson, John L. McGinn, R. C. Wood, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. **[1050]** Clark, J. A. Healey, George Preston, B. R. Dusenbury, and L. N. Jesson, are Defendants and Appellants, and it was made pursuant to and in accordance with the praecipe of the Defendants and Appellants filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith.

And I do further certify that the original Citation is included in said transcript, and that the index thereof, consisting of pages i to v inclusive, is a correct index of said transcript on appeal; also that the costs of preparing said transcript, and this certificate, amounting to the sum of three hundred and ninety-eight dollars ($398.00), have been paid to me by counsel for defendants and appellants.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court, at Fairbanks, Alaska, this 27th day of November, 1914.

[Seal] ANGUS McBRIDE,

Clerk of the District Court, Territory of Alaska, Fourth Division. **[1051]**

[Endorsed]: No. 2528. United States Circuit Court of Appeals for the Ninth Circuit. John A. Jesson, E. R. Peoples, James W. Hill, Ray Brumbaugh, R. C. Wood and John L. McGinn, Appellants, vs. F. G. Noyes, as Receiver of the Washington-Alaska Bank, a Corporation Organized Under the Laws of the State of Nevada, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Received December 15, 1914.

F. D. MONCKTON,
Clerk.

Filed December 21, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Stipulation re Omission from Transcript of Record, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2528.

JOHN A. JESSON et al.,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a Corporation, etc.,

Respondent,

No. 2529.

R. C. WOOD, JOHN L. McGINN and J. A. JESSON,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a Corporation, etc.,

Respondent,

IT IS HEREBY STIPULATED by and between the respective parties to the above-entitled actions that an order of Court may be made for a diminution of the record in respect to the Bill of Exceptions contained in case No. 2528, in that the same may be enlarged in the following respects, viz.: That an order may be made directed to the clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, requiring the said clerk to send up to the above-entitled court the following portions of the

Bill of Exceptions inadvertently omitted therefrom, namely:—

1. The opinion of the Judge of the District Court for the Territory of Alaska, Fourth Judicial Division.

2. A stipulation entered into between O. L. Rider, as attorney for the plaintiff below (Respondent in both cases here) and John L. McGinn, one of the attorneys for the defendants below (Appellants in both cases here), to the effect that all depositions presented on the hearing of said case in the court below should be incorporated in and made a part of the record on appeal; said stipulation being now on file in the Clerk's office of said District Court for the Territory of Alaska, Fourth Judicial Division.

3. Deposition of one Dr. Cassells offered and read in evidence by the plaintiff below.

And that such further orders may be made by the Court in the premises as is necessary upon the motion hereafter to be made by the undersigned attorneys for the Appellants in both of said cases.

Dated February 16th, 1915.

JOHN L. McGINN,
METSON, DREW & MACKENZIE,
Attorneys for Appellants.
O. L. RIDER,
Attorney for Respondent.

[Endorsed]: Nos. 2528–2529. United States Circuit Court of Appeals, Ninth Circuit. John A. Jesson et al., Appellants, vs. F. G. Noyes, as Receiver, etc., Respondent, R. C. Wood et al., Appellants, vs.

F. G. Noyes, etc., Respondent. Stipulation. Filed Mar. 8, 1915. F. D. Monckton, Clerk.

At a Stated Term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Courtroom Thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighth day of March, in the Year of Our Lord One Thousand Nine Hundred and Fifteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2528.

JOHN A. JESSON et al.,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a Corporation, etc.,

Appellee.

No. 2529.

R. C. WOOD, JOHN L. McGINN and J. A. JESSON,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a Corporation, etc.,

Appellee.

Order Directing Clerk of Court Below to Send Up to This Court Certified Copy of Certain Papers.

It appearing from the written stipulation entered into between the parties to the above-entitled causes, that certain portions of the Transcript of Record on Appeal, necessary to the hearing of the said causes herein, have been omitted, which stipulation is on file herein, now therefore, upon motion of Mr. R. G. Hudson, of counsel for the appellants, it is ORDERED that the clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do send up to this Court, at the cost of the appellants, a certified copy of the following papers, to wit:

(1) That portion of the Bill of Exceptions contained in case No. 2528, which has been omitted therefrom, to wit, the deposition of one Dr. W. G. Cassels, offered and read in evidence by the plaintiff below (the appellee in both cases here), the same to be incorporated in said Bill of Exceptions as though it had been originally incorporated therein, at page 238 of the typewritten record, with such preliminary words as may be necessary to show its introduction in evidence upon the trial of said cause.

(2) The Opinion of the Judge of the District Court for the Territory of Alaska, Fourth Division, rendered in said action No. 2529.

(3) A stipulation entered into between O. L. Rider as attorney for the plaintiff below (appellee in both cases here), and John L. McGinn, one of the attorneys for the defendants below (appellants in both cases here), to the effect that all depositions presented on the hearing of said causes in the court be-

low should be incorporated in and made a part of the record on appeal.

[Certified Copy of Opinion of Fuller, D. J.]

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 1756.

F. G. NOYES, Receiver of Washington-Alaska Bank, a Corporation,

Plaintiff,

vs.

J. A. JESSON et al.,

Defendants.

OPINION.

This is an action by the receiver of an insolvent bank against the various defendants, charging them with different wrongful and negligent acts and conduct, whereby the bank was injured and its assets wasted so that it became unable to pay its creditors, and asking that an accounting be had and judgments rendered against the defendants for such amounts as may be found due from them respectively.

It is alleged that the Fairbanks Banking Company was organized as a corporation, under the laws of the State of Nevada, on January 21, 1908, and began business at Fairbanks on March 15, 1908, and continued as such until receivers were appointed to take over its assets and wind up its business on January 5, 1911, the name of the corporation, however, having

been changed to that of Washington-Alaska Bank on September 14, 1910. The defendants were officers and directors of the corporation during the time it was carrying on business, and it is by reason of wrongful and negligent acts in their capacity as such officers and directors that the plaintiff seeks to hold them liable in this action.

The corporation was formed for the purpose of taking over the business of the Fairbanks Banking Company, a copartnership consisting of E. T. Barnette, R. C. Wood and James W. Hill, and the first matter charged in the complaint is on account of an over-valuation of the assets of that partnership, and particularly in respect to two items of such assets, namely, certain shares of stock representing four-fifths of the entire capital stock of the Gold Bar Lumber Company, a corporation organized under the laws of the State of Washington, and doing business in that State, which was taken over by the corporation from the partnership at an agreed valuation of $341,949.00, and which it is charged cost such partnership only $248,067.89, and was at the date of the transfer worth less than that sum, the over-valuation thus being in excess of $93,881.11; and of certain notes then past due, worthless and uncollectible, amounting to $53,287.49. A written agreement was executed by the copartnership and the directors of the corporation on March 16, 1909, reciting the terms and conditions of the transfer of the property, and it is charged that the directors in office at that time unlawfully credited the partnership with, and agreed to

pay to said partnership, on December 31, 1909, the sum of $39,642.81, representing interest accruing on the notes transferred to the corporation from December 31, 1907, to March 15, 1908, which item was not included in the written agreement, and it is charged to have been voluntarily given to the partnership, without any consideration therefor. It is next charged that the defendants unlawfully began to diminish the assets and capital stock of the corporation, by surrendering to subscribers stock certificates which had been issued to them, and paying them the amounts of their subscriptions, such surrendering of stock beginning June 30, 1910, and being made at various times until October 25, 1910, the total amount of stock thus cancelled and surrendered amounting to $56,000.00. On September 30, 1909, it is charged, the directors purchased the stock of the Washington-Alaska Bank, a corporation organized under the laws of the State of Washington, and doing business at Fairbanks, paying therefor the sum of Two Hundred & Fifty Thousand Dollars ($250,000.00); that the amount of such stock was only $150,000.00; and that by reason of such purchase more than $100,000.00 of the assets of the bank were lost. It is charged that on May 12, 1909, the directors purchased one-half of the capital stock of the First National Bank for the sum of $62,500.00, and that at the same time the Washington-Alaska Bank purchased the remaining one-half of the stock of the First National Bank for a like sum; and that subsequently, on May 12, 1910, the officers and direc-

tors of the Fairbanks Banking Company sold all the stock of the First National Bank to R. C. Wood and John L. McGinn—that is, the one-half originally purchased, and the other half which it had acquired in the meantime through its purchase of the Washington-Alaska Bank stock—for the sum of $125,000.00, and that by reason thereof the Fairbanks Banking Company sustained a loss of $25,000.00. Another charge is that on April 12, 1910, the Directors of the Fairbanks Banking Company declared a dividend of twenty per cent upon the outstanding capital stock, amounting to $33,720.00, and that on this date the company had no undivided profits or surplus in excess of its liabilities, but, on the contrary, was in an insolvent and failing condition. And finally, it is charged that on October 1, 1910, the officers and directors of the Fairbanks Banking Company caused its business and assets to be consolidated and amalgamated with those of the Washington-Alaska Bank, whose stock it then held, and assumed all the liabilities of the Washington-Alaska Bank, which were greatly in excess of its assets, causing still further injury to the Fairbanks Banking Company.

It is alleged that the Receiver has taken charge of the assets of the company, and so far as possible reduced them to cash and distributed them among the creditors, but that he has been unable, so far, to pay them only fifty per cent of the amounts due them, and that after exhausting all the remaining

assets and applying them upon the corporation's indebtedness, there will still remain a large sum due to the creditors of the bank.

The defendants who have appeared by their answers have denied all misconduct and acts of negligence on their part, and have further set up that after the appointment of a receiver, E. T. Barnette and his wife transferred to the receiver a large amount of property for the purpose of paying all the obligations of the corporation, and that the same was accepted by the receiver, under the order of this Court, in full settlement of any liability on his part; and that inasmuch as he was at all times a director with the answering defendants, and jointly liable with them for any acts of misconduct or negligence, that this transaction operates as a bar to any suit against them; and further, that the receiver has received certain sums of money from the property thus transferred by Barnette and his wife, and that the sums so received exceed the sum for which any answering defendant is liable.

The effect of the transfer of the property of Barnette and his wife to the receiver, to be by him held in trust until November 1, 1914, and to be then available for the payment of any sums remaining then due to the creditors of the corporation, has been heretofore considered upon questions raised by the pleadings, and it has been decided that this did not operate to release any of the defendants, and was not accepted by the receiver in satisfaction of the claims of the corporation or its creditors against any of the defendants, but that such transaction was in effect

an agreement not to sue Barnette prior to the expiration of the trust agreement, and that instead of preventing the receiver from proceeding against these defendants, it rather rendered it necessary for him to take all proper steps to recover whatever possible upon the liabilities of any other person to the corporation or its creditors.

It appears from the evidence that the partnership, the Fairbanks Banking Company, was in an embarrassed condition in December, 1907, and had temporarily closed its doors, and that a committee of its depositors was appointed to examine into its condition; that after such examination, the committee reported that the assets exceeded the liabilities by a considerable amount, and recommended that the bank continue business, but that owing to the peculiar financial conditions then existing, it should issue a certain amount of scrip, to be issued by trustees in whose hands a certain amount of its securities were to be placed, to meet the current demands of its depositors; and that thereupon the partnership banking company resumed business, and such scrip was issued, and was in current use until after the time of the transfer of the partnership business to the corporation; that after the partnership had resumed business, a plan was formed for the incorporation of the Fairbanks Banking Company under the laws of Nevada, to take over the business of the partnership, and that on January 5, 1908, a public meeting was held and arrangements made for subscription to stock, and a committee appointed to examine into the value of the assets of the partnership,

and to report a basis upon which the business should be taken over, two of the members of this committee having been members of the committee of depositors which had in December examined the assets. That committee had made the following report, which seems to have been accepted by the subscribers to the stock of the corporation:

> "That the notes, properties and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees and on which a valuation of $288,000.00, in excess of its total liabilities was placed, be accepted; and
>
> "That all notes, properties and securities which said board of trustees placed in the number 3, or doubtful class, remain the property of the old institution; and
>
> That all interest on existing loans as December 12, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that same be payable on or before December 31, 1908; and
>
> That should James W. Hill and R. C. Wood not take the full $44,000.00 in stock in the new corporation the balance of the amount not so taken to be paid to them not later than July 1, 1908; and
>
> That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of $200,000.00 without interest for one year be accepted, and that it be the under-

standing that such deposit will secure said new corporation against any adverse decision of the Court in the Causten vs. Barnette suit in so far as such decision may decrease the value of the Gold Bar property as accepted by the present board of trustees."

The incorporation papers not having been received by February 15, the taking over of the partnership business by the corporation was delayed until March 12, 1908, when a stockholders' meeting was held in Fairbanks, and by-laws adopted and officers elected, the stock subscription accepted, and the matter of taking over the business of the partnership left to the board of directors then elected. Pursuant to this authority, the directors entered into the agreement of March 10 above referred to. This agreement mentions in detail the assets of the partnership, and fixes a valuation thereon, the total resources as agreed upon by the parties being of the value of $790,940.31, and the liabilities $538,940.31. The members of the partnership agreed to accept stock of the corporation at its par value for the amount of the excess of the assets over the liabilities, at the valuations agreed upon, except that $200,000.00 of such excess is agreed to be due E. T. Barnette, and payable to him in cash, but such sum to remain as a special deposit with the corporation until such time as certain litigation concerning the Gold Bar Stock shall have been determined, and to secure the corporation from any loss on account of such litigation. It seems that some of the notes passed upon by the committees were not turned over to the corporation, and that the amount

of stock issued to the partners were less than was contemplated under the report of the committee of January 5, and less than had been subscribed for by Hill, Wood and Barnette in the subscription list then circulated. On that subscription list Barnette subscribed for 440 shares, Wood 220 shares, and Hill 220 shares; while under the agreement of March 16, 1908, 260 shares were issued to Barnette, 130 shares to Hill, and 130 shares to Wood. Wood was absent from Fairbanks during all of this time, and did not return until about the middle of April, 1908, and it seems that at this time the agreement with the corporation was signed by him, his name having been signed to the stock subscription list on his behalf by Barnette. He testifies that it was distinctly understood between him and the directors at the time he did sign the agreement, that he should have the right to take cash, instead of the par value of the shares subscribed for, on July 1st, and that as evidence of such understanding there was then shown him the report of the committee of January 5th and the minutes of the corporation, wherein this was set forth. Prior to his returning to Fairbanks, he had performed some acts as cashier of the corporation in Seattle, and he continued to act as such cashier until June 30th. On June 29th, he tendered his resignation, and on July 1st was paid $13,000.00, the par value of the stock allotted to him. The certificates for this stock seem never to have been in his possession, but to have remained undetached in the stock-book of the corporation. Whatever may be said of the rights and liabilities of Wood, under the written

agreement of March 16, if this were still an executory agreement, it seems that now, the agreement having been fully executed, in accordance with what was then the understanding of all the parties, and cash, in place of stock, delivered to Wood, the receiver is not now in a position to set aside this executed contract, and to enforce the terms of the written contract, although such written contract varies, in some respects, from the one actually carried out by the parties. It would seem that the same reasoning should apply to the item of $39,000.00, interest accruing from December 31, 1907, to March 15, 1908, upon the paper of the partnership transferred to the corporation, and which was paid to Barnette, Hill and Wood by the corporation on December 31, 1908. The minutes of the meeting on January 5, contemplate that interest accruing from December 31, 1907, to February 15, 1908, should be paid to the partnership; and it was also contemplated at that time that the business of the partnership should be taken over by the corporation on February 15. It was impossible, however, for the actual transfer to be made until March 15, and in view of all of the transactions between the parties, it seems that their intention was that the accruing interest, after December 31, 1907, until such time as an actual transfer of business should be made, should belong to the partnership rather than the corporation.

Whatever subsequent events may have shown to be the actual value of the assets taken over, it has not been shown, by the evidence given in this case, that there was any actual fraud in the determination of

the value placed upon such assets by the directors in March, 1908. The evidence rather shows that such value was placed upon these assets by the stockholders themselves, acting through their committee, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for the transfer, rather than that the directors should exercise their individual judgments in determining the value of such assets. While considerations other than the issuing of stock were paid to the partnership, the whole transaction was essentially one involving the issue of stock of the corporation for property, and the laws of Nevada, under which the corporation was organized, and by which the liability of the defendants must be determined, provides:

> "Any corporation existing under any law of this State may issue stock for labor done, or personal property, or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive."

The directors at that time appear to have been acting in good faith, and to have invested considerable sums of their own money in the stock of the corporation, and subsequently to have left, in addition, considerable sums of money on deposit with the new bank. While it may be that the fact that such a large part of the notes taken over were past due should have shown that such paper was an undesirable asset

for a bank, there is no evidence that the directors at that time did not honestly believe it to be worth the valuation placed upon it; nor has the evidence shown that the valuation placed upon the stock of the Gold Bar Lumber Company was known to be excessive, or that the directors had any good reason to believe that it was excessive. There has been considerable evidence produced concerning the value of this stock at various times, from the time it was purchased by the partnership in 1906 to the present time, but the only evidence that can be really considered as reliable, as showing its market value, is that during the present year it was sold at public sale in Seattle for the sum of $100,000.00. The uncertainty of the evidence concerning its value is clearly apparent from the testimony of the officer of the bank making this purchase, given shortly after the sale was made, to the effect that he then considered it worth $300,000.00. It is apparent from the history of the bank that the investment in this stock was the principal source of trouble throughout its existence, and this not because the stock was necessarily worth less than the valuation at which it was taken over by the corporation, but because it was not a proper asset for a bank to invest its funds in. The total issued stock of the corporation at no time exceeded 2,156 shares, of a par value of $215,600.00, a considerable part of which was not paid for in cash, but by the notes of the subscribers; and at the time it commenced business, on March 15, 1908, there had been subscribed for only 1,502 shares, in addition to those allotted Barnette, Hill and Wood; so that at the time it began

business, with practically a capital of only $150,-200.00 partly paid in, $349,829.00 was invested in a distant State, in an uncertain, risky and speculative business, and not under the immediate control of the directors. In addition it had agreed to pay one person, E. T. Barnette, the sum of $200,000.00, and it was liable to have this large amount called for in cash within a short time. It is evident that the persons who met in January 5, 1908, styled themselves "Representative mining, business and professional men of Fairbanks and vicinity" were either ignorant of the ordinary rules of safe banking, or were recklessly determined to invest their own funds, and the funds of their depositors, not in an ordinary banking business, but in a speculative enterprise in lumber manufacturing and dealing in timber lands. There is no evidence, however, that there was any concealment of this enterprise, nor that the depositors did not know the nature of the transaction; nor that the stockholders of the corporation were not as fully informed in regard to its merits as were the directors. The law, as it existed at that time, did not prohibit a banking corporation from investing its funds in such a way, and the law of Nevada and the articles of incorporation of the company, not only did not prohibit such speculation, but authorized such transactions by the corporation. Neither does the evidence in regard to the purchase of the stock of the Washington-Alaska Bank, in September, 1909, show that the amount paid for it was so much in excess of its actual value that the directors can be held either to have knowingly paid an excessive amount,

or to have, by their negligence, failed to have ascertained the true value. The books of that bank at that time showed deposits of over $1,800,000.00, and gold-dust and actual cash on hand and in banks, subject to immediate call, of about ninety per cent of that amount; that the book value of the stock, as shown by the books of the bank, was over $206,000.00, and that the bank for some time had been earning $50,-000.00 a year. Evidently, a corporation of such earning capacity possessed a franchise and goodwill of considerable value, and even if some of the paper it held was past due, and of more or less doubtful value, the total assets and business of the bank may well have been worth the price paid for the stock by the Fairbanks Banking Company. With proper management an institution in such condition should, under ordinary business conditions, have earned sufficient to have justified the price paid for its stock. It is evident, however, that the Fairbanks Banking Company, by this purchase, did not strengthen its position, but, on the contrary, weakened it by further tying up its assets in unavailable and more or less uncertain property, for while its capital stock had not been increased, it had undertaken to carry on a business more than double that formerly carried on. But it is not for mere mistakes in business judgment that directors of a corporation are to be held liable.

Nor is it apparent from the evidence upon what basis any damages can be claimed against the directors, on account of their transactions with the stock of the First National Bank. This stock was acquired in May, 1909, and at the same time an op-

tion was given to Wood to purchase it at the same price in May, 1910, and it was on this latter date sold to him for this price; so that there was no actual loss from the transaction, except that during this time the funds of the bank were tied up in the stock, and no returns realized therefrom. There was no evidence tending to show that it was an advantage to the Fairbanks Banking Company to have control of the First National Bank during this time, as it thus prevented competition in the purchase of gold-dust. There was no evidence as to the earnings of the First National Bank during the time its stock was carried by the Fairbanks Banking Company, nor any evidence that it was worth more at the time that it was sold than at the time when it was purchased; nor any evidence that the option given at the time of the purchase for a resale was illegal or fraudulently entered into by the directors. The actual consolidation of the business of Fairbanks Banking Company, and the Washington-Alaska Bank, in the fall of 1909, does not seem to have worked any actual damage to the stockholders of the depositors of the Fairbanks Banking Company, whatever may have been the unfortunate results to the depositors of the Washington-Alaska Bank; and as this is an action by the receiver of the former company, it is not one wherein any recovery can be had for losses sustained by the creditors of another corporation.

As stated above, the plaintiff's complaint alleges that soon after the corporation began doing business, it commenced to diminish its capital stock by surrendering a certain part thereof to its stockholders,

and cancelling certain stock subscription and certain shares of stock that had been issued. The evidence showed that, beginning June 30, 1908, with the payment to Wood of $13,000.00 for 130 shares of stock agreed to be issued to him, and ending October 25, 1910, when 100 shares of stock were purchased from John L. McGinn for $6,000.00, shares of stock amounting to $56,000.00 were taken over by the bank. Plaintiff contends that this was in direct violation of the laws of Nevada, under which the corporation held its charter, and that under those laws the directors, at the time any stock was surrendered, are jointly and severally liable for the amount thereof; while the defendants contend that the corporation had a right to purchase its own stock, and that all of the stock thus taken over was retained as treasury stock, and subject to reissue, that some of it was actually resold, and that in no event can the purchase of its own stock by a corporation be held to operate as a reduction of its capital stock, unless there is an express intention to retire such stock and not to reissue it. Section 68 of the Corporation Act of Nevada, under which plaintiff claims the liability of the defendant exists, is as follows:

> "It shall not be lawful for the trustees or directors to make any dividend except from the net profits arising from the business of the corporation; nor to divide, withdraw, nor in any way pay to the stockholders, or any of them, any part of the capital stock of the company; nor to reduce the capital stock, unless in the manner prescribed in this Act, or in accordance with the

provisions of the certificate or articles of incorporation; and in case of any violation of the provisions of this section, the directors or trustees under whose administration the same may have happened, except those who may have caused their dissent thereto to be entered at large on the minutes of the board of directors or Trustees at the time, shall in their individual and private capacities, be jointly and severally liable to the corporation, and the creditors thereof, to the full amount so divided, withdrawn or reduced, or paid out; PROVIDED, that this section shall not be construed to prevent a division and distribution of the capital stock of the company which shall remain, after the payment of all its debts, upon the dissolution of the corporation or the expiration of its charter; PROVIDED, ALSO, that this section shall not prevent the retirement or conversion of either stock or bonds or the distribution of the earnings or accumulations of the corporation as provided for in the articles or certificate of incorporation, original or amended."

The defendants cite numerous authorities to sustain their contentions, and I am satisfied that the weight of authority in the United States is that a corporation, where not prohibited by statute or its charter, may purchase shares of its own stock, and that whether or not such purchase operates as a reduction of the capital stock, depends upon the intention with which it is purchased, and that if it is the intention to reissue the purchased stock, the capital

of the corporation is not necessarily reduced by reason of the stock being held for a time as treasury stock. I am not satisfied, however, that this meets all the prohibitions contained in the statutes of Nevada. The Act not merely prohibits the directors from reducing the capital stock unless in the manner prescribed by law, or in accordance with the provisions of the certificate or articles of incorporation, but it makes it unlawful for them "To divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company." The law provides that this section shall not prevent the retirement or conversion of either stock or bonds, or the distribution of the earnings or accumulations of the corporation as provided for in the articles of certificate of incorporation, original or amended; but I find nothing in the articles of incorporation of this company which provides for such retirement or conversion, nor do I think the provision of the articles giving the corporation authority to purchase stock and bonds can be held, as contended by defendants, to authorize it to purchase shares of its own stock and pay for them out of its capital.

The corporation laws of the State of New York contain a provision almost identical with that of the Nevada statute, and in construing this, one of the authorities cited by the defendants uses the following language:

> "Does this section broadly forbid the purchase by the corporation of its shares of stock held by its directors? Clearly not, if the transaction is fair and honest, and in the interest of such cor-

poration, and not of the selling directors, and therefore not offensive to the law under the cases cited. But the directors shall not 'in any way pay to the stockholders, or any of them, any part of the captial of such corporation,' and by the concluding words of the section this is not to 'prevent a corporation from accepting shares of its capital stock in complete or partial settlement of a debt owing to the corporation,' and deemed bad or doubtful. By implication it may forbid the purchase of any property of any description from the stockholders, and the payment therefor from the capital of the corporation; that is, from any fund except the surplus. The prohibition, if it applies to purchases of property, applies no more to a purchase of stock than to any other thing of value. The purchase of the stock of the corporation by the corporation from the stockholders is not prohibited or forbidden, but payment therefor from the capital may be and possibly is."

In re Castle Braid Co., 145 Fed. 232.

The same matter was under consideration in another case, wherein the following language occurs:

"I must say that all such rights appear to me to be quite contrary to a reasonable protection of creditors, unless they are limited to purchases which leave the original capital intact—i. e., purchases from surplus—because they necessarily result in keeping up the appearance of a capital which has been actually depleted. If a corporation has received property into its treasury of

the value of its authorized shares, that is no doubt subject to the vicissitudes of its enterprises, which will be represented by public knowledge of its success or of the value of its shares. If, however, it purchases its own shares, this affects neither the value of the other shares, the success of its enterprises, nor the amount of its apparent share capital. It is merely a method of secret distribution, against the deceit of which its creditors have absolutely no means of protection. The fund which they have the right to rely upon has been surreptitiously taken from them. It seems to me very little relief against the evils which such a right causes to limit it to cases where the corporation is thought to be solvent. It is a strange thing, I think, that there have been cases which permit the practice which seems to me to be inevitable mischievous commercially."

In re Tichenor-Grand Co., 203 Fed. 721.

A similar provision was also contained in the corporation laws of the State of California, and concerning it, in an early case in the Supreme Court of that State, the Court says:

"The policy which dictated that provision is obvious. Persons dealing with corporations do so upon the faith that its property and all its assets of whatever nature, are vested in trustees or managers, to be held by them as a fund which shall be primarily liable for its debts. For although the stockholders, and in some events the trustees, may be individually liable to creditors,

it is the property and capital of the corporation to which creditors chiefly look, and which give it credit in the community. To protect the rights of creditors and to guard against improvident or fraudulent conduct on the part of trustees and stockholders, the Legislature has wisely provided in the section we have quoted, that the capital stock of the company shall remain intact, and shall not be devoted to the stockholders, either in the shape of dividends, payments, or withdrawals; nor by way of a reduction of the capital stock (unless in the manner provided by law) except on a dissolution of the corporation in the method prescribed by law, nor even then, until 'after the payment of all its debts.' Dividends can only be declared from 'the surplus *profits* arising from the business of the corporation,' and it shall not be lawful 'to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company,' except after payment of all its debts, on a dissolution of the corporation. This language leaves no room for construction or doubtful interpretation. It is direct, explicit and unmistakable. But it was not intended to interfere with the plenary power of the trustees over the legitimate business of the corporation. They may manage, control and alienate its property in the regular course of its business, but they can not devote the proceeds, beyond the surplus *profits,* to the stockholders, either directly or in-

directly, until after all its debts are paid."

Martin v. Zellerbach, 38 Cal. 307.

"We do not deem it necessary to inquire whether the plaintiff's debt accrued before or after the attempted execution of the agreement between the two companies. If the agreement was contrary to law, as we hold it to be, it cannot be enforced in equity against any creditor, either prior or subsequent, without notice of the transfer at the time of giving the credit of the corporation. As to all creditors of the company, prior or subsequent, it was simply void; and no reason has been suggested why a creditor who has in no way promoted the void act should be estopped from contesting it."

Martin v. Zellerbach, 38 Cal. 311.

In a case where a stockholder had sold his stock to the corporation, the Supreme Court of Washington says:

"The result was a reduction of the amount of the capital stock funds in the hands of the corporation by the payment of a portion thereof to a stockholder. Such a result is directly contrary to the provisions of Section 4265, 1 Ballinger's Codes & St., which makes it unlawful 'to in any way pay to the stockholders or any of them any part of the capital stock of the company.' It is alleged that creditors held indebtedness against the corporation at the time respondent was paid this money, that the claims are still unpaid, and that the holding of such money by respondent is to their prejudice, since the corporation is now

insolvent. It is not alleged that the company was insolvent at the time the transaction occurred, but we think that is immaterial, since the thing that was unlawfully done reduced the available resources of a now insolvent company, and, if such reduction had not been made, the amount thereof should now be on hand for the benefit of creditors.

In Barto v. Nix, 15 Wash. 563, 46 Pac. 1033, a bank accepted the stock of a stockholder in payment of his indebtedness to the bank. It appears that this was done in order to protect the bank from loss, and that it was the intention to reissue the stock. This court upheld the transaction on the ground that it was a *bona fide* one for the purpose of protecting the corporation from loss. But the stock was reissued to other stockholders, and no reduction of the capital stock resulted from the transaction. The Court observed in that case, at pages 568 and 569, 15 Wash., and page 1034, 46 Pac., that 'it might be conceded that a corporation in this state cannot traffic in its own stock. Such we believe to be the established rule in all the states having a similar statutory provisions. But it does not follow that it may not receive such stock in payment of the indebtedness of one of its stockholders, when such transaction is *bona fide* and for the purpose of protecting the corporation from loss.' "

Tait v. Pigott, 73 Pac. 364; 80 Pac. 172.

The most, therefore, that can be said of the author-

ity of the directors to purchase stock of the corporation is, that while the directors had such right under the charter and the laws of Nevada, they could exercise such right only when the purchase price was paid from net profits or surplus funds of the corporation, and not where any part of its capital stock was used for such purpose. There might be special circumstances where, apparently, this would result, and still the directors would not be liable for any damages, if in view of all the circumstances such a purchase was evidently for the best interests of the corporation. Even where corporations have been absolutely prohibited by statute from purchasing their own stock, it has been considered lawful for them to take their stock in payment of a debt past due, or where it seemed necessary in order to prevent loss to the corporation. Some of the transactions complained of in the complaint seem fairly to come within this rule. The payment made to Wood has already been referred to, and the view expressed that the directors were not liable, on the ground that such stock had not really been issued to him, but that under the original contract between the corporation and the partnership, he was allowed to take cash instead of stock within a certain time. It appears that on November 18, 1908, 10,000 shares of stock belonging to Strandberg Brothers, 1,000 belonging to Emma Strandberg, and 1,000 belonging to B. E. Johnson, a partner of Strandberg Brothers, were taken in part payment of a loan, the bank also receiving at that time from these parties the sum of $4,000.00 in cash, making full payment of the loan.

While this loan was made only a short time before, and the shares of stock mentioned were taken as part security for the loan, it cannot be said from the evidence that such a change had not taken place in the condition of the debtors within that time as to make this transaction for the best interests of the bank, and that the transaction amounted to a taking of stock for a pre-existing debt, rather than, as contended by the plaintiff, that the whole transaction amounted to a purchase of stock by the directors. Undoubtedly, if a loan were made to a stockholder, and some time afterward he found that he was unable to pay the loan, the directors would have been fully justified, under all authorities, in taking his stock in satisfaction of the loan; and the fact that only a few days elapsed between the loaning of the money and the calling of the loan is not sufficient to show bad faith in the directors, nor that they contemplated purchasing the stock at the time the loan was made. A more difficult question is presented by the transaction resulting in the purchase of the stock of McGinn on October 25, 1910. The defendants' answer alleges, and the evidence tended to show, that at this time McGinn was interested in the First National Bank of Fairbanks, and that competition between it and the Fairbanks Banking Company was very keen; that as a stockholder of the Fairbanks Banking Company he demanded the right to inspect its books and papers, and threatened, in case this right was not granted him immediately, to make application to Court for an order permitting him to do so, and also for a receiver; that the directors of the

Fairbanks Banking Company feared that information obtained by such inspection would be used by him in promoting the interests of its rival in business, and that any litigation started would impair public confidence in the bank; and perhaps start a run of its depositors on the bank; and that, acting under this belief, they authorized their cashier to loan a purchaser of the stock sufficient funds to pay for the same; that the cashier purchased the stock in his own name, and gave his note to the bank for the amount thereof, and paid McGinn the sum of $6,000.00 for his 100 shares of stock; and that soon thereafter the cashier, without the knowledge of any of the directors, cancelled his note, and charged the amount thereof to the bank, and that the stock was thereafter held with the other treasury stock of the company. It can scarcely be said that, in view of all these circumstances, the directors were utterly unjustified in purchasing the stock for the bank, if it should be held that the transaction did amount to a purchase by the bank directly, while if the directors really contemplated loaning funds to another for the purchase of the stock, and only authorized such loan, but not a purchaser by the bank itself; and the cashier, being a person in whom they had the right to place confidence, thereafter violated their instructions, and without their knowledge, used the funds of the bank to reimburse himself for the purchase of the stock made, then clearly the directors would not be liable therefor, in the absence of direct knowledge of such transaction. With the exception of these transactions, it seems that the purchases of the

other shares of stock, as charged by the complaint, were made, if not with the direct personal knowledge of the directors, at any rate under such circumstances that knowledge thereof was brought home to them, and they must be held to have ratified the same; also that they were made at times when the corporation had not surplus earnings or profits on hand, but were, in fact, made from the capital stock; that the directors at one time, at all events, had knowledge of such proceedings, is evident from the minutes of their meetings, where, on July 13, 1908, they passed the following resolution:

> "The president submitted a written report in detail, showing the condition of the affairs of the bank as July 11, 1908. The report was examined in detail, and on motion duly made and seconded, it was ordered filed. Under questions of this report, question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock be paid for same and stock returned to the treasury of the bank."

While undoubtedly the directors at that time in good faith believed that they had a right to do this, it should not exempt them from liability for the results, if their action was in fact contrary to the provisions of the statute; and the directors in office at that time should be liable for stock surrendered, although they may not have had knowledge of each particular transaction, until some different course of proceeding was adopted by the board; and also

directors in office, when subsequent surrenders were made, under similar conditions, should be liable for the same. It is true that at the time some of the stock was surrendered, the books of the corporation showed a slight surplus of assets over liabilities, but they did not at any time show sufficient to equal the sum of $200,000.00, the amount of capital stock with which the corporation was authorized by its articles to commence business; and I am satisfied that the directors had no right to pay out for the purchase of stock any sums which would reduce the capital below that amount. It appears, moreover, that during all this time the bank was carrying a large amount of paper long past due; and while the directors may in fact have relied upon the statements of the officers of the bank, and the reports made by them as showing the true condition of the bank's affairs, it would seem that reasonable diligence on their part would have revealed that among these assets were many of so doubtful a character as to require their deduction from the assets of the bank. This is particularly true of the note of the Tanana Electric Company, dated December 16, 1907, for the sum of $27,997.38, the maker of which was in the hands of a receiver, and in a hopelessly insolvent condition. And while it was evident that the original incorporators had relied upon some alleged guarantee of this amount by either J. E. Chilberg or the Scandinavian-American Bank of Seattle, it was well known that this guarantee had been repudiated by them, and that any attempt at collection from them would be strenuously resisted. On April 12, 1910, a

dividend of twenty per cent upon the outstanding capital stock of the company was declared, and on April 15 paid to the stockholders, or credited to them in their bank accounts. The transaction appears from the following minutes:

> "Mr. Wood informed the board that the Washington-Alaska Bank had declared a dividend of 33⅓ per cent of its capital stock, amounting to $50,000.00, which would be paid to the Fairbanks Banking Company, owners of the stock.
>
> It was then moved by Wood, seconded by Jesson, that $25,000.00 of this amount be credited to 'Stock Account,' thus reducing the valuation at which this stock is held, and the other $25,000.00 be credited to 'Undivided profits.' (Motion carried.)
>
> Moved by Jesson, seconded by McGinn: That the Fairbanks Banking Company declare a dividend of twenty per cent on its paid-up capital stock, namely, $168,600.00.
>
> (Motion carried.)"

At this time the books of the bank showed the amount of undivided profits to be $7,749.82, before the declaration of the dividend of the Washington-Alaska Bank, and after payment of that dividend, according to the disposal thereof made by the directors, $25,000.00 was added to the amount of undivided profits, making a total of $32,749.82. But included within the assets of the bank was a large amount of overdue paper. $111,243.51 of such paper, past due at that time, still remains unpaid,

including the note of the Tanana Electric Company above referred to; and the stock of the Gold Bar Lumber Company was still carried for the same amount as when taken over by the partnership, more than two years before, although no dividends whatever had been paid thereon, and a large amount of the standing timber upon the lands of that company had been cut, turned into lumber and sold, and the proceeds either used up in expenses or in maintaining and enlarging the equipment of the plant. The evidence as to the actual value of the assets of the corporation at this time is scarcely sufficient to form a basis of an accurate calculation. The testimony, however, does show that the value of the Gold Bar stock was less than it was in 1907 or 1908, and that there was still less reason for believing that anything could be realized from the note of the Tanana Electric Company. Undoubtedly some of the notes then past due, and which never have been paid, may have been reasonably supposed to have been of value at that time, and there is no doubt that the subsequent failure of the bank so upset financial conditions, and interfered with business in this vicinity, that on account of the failure alone many debtors were unable to meet their obligations, who would have done so had the bank continued in business. But the conclusion seems irresistible that even if the bank was not actually insolvent, at any rate its capital was seriously impaired on this date, and that any distribution of its assets in the way of a dividend by the directors was unjustifiable. Even upon the face of the books as the accounts were

therein carried, the dividend declared and paid exceeded the amount of undivided profits, and was greater than would have been justified under the law, had all the assets been worth the full value at which they were carried on the books. Besides in making any dividend at this time the directors were acting directly contrary to the express by-laws of their corporation, one of which, defining their powers, is as follows:—

> "To declare dividends semi-annually out of the net profits of the corporation earned up to the 30th day of June of each year, and from the 30th day of June to the 31st day of December of each year, said dividends to be declared by the board of directors at the first regular meeting held subsequent to the 30th day of June and the 31st day of December of each year; PROVIDED, HOWEVER, that no dividend shall be declared or paid that tends to curtail the effective operations of the business of the corporation."

It is apparent that the action of the board in declaring a dividend at this time was not in accordance with this provision of the by-laws, in that it was not made at the time authorized, and that there was no such amount of net profits at the end of the preceding half year, ending December 31, 1909, as to justify such a dividend. It may be that the proviso, "That no dividend shall be declared or paid that tends to curtail the effective operations of the business of the corporation" referred to matters to be determined exclusively by the board of directors, and that they,

by their action, having expressed their opinion that the declaration of a dividend at that time would not curtail the operation of the business of the corporation, the Court may not, because it is of a different opinion, hold that the dividend was illegally declared; but whether this is so or not, it is certainly proper to consider all of the conditions surrounding the business of the bank in determining whether or not the dividend was improperly declared. Defendants have cited numerous authorities to the effect that although a dividend was illegal, creditors cannot complain thereof, where the only result was to reduce the capital stock of the corporation, but not to render the corporation insolvent, and that the thery that the capital and assets of a corporation constitute a trust fund, to be held and managed by the directors for the benefit of the creditors and stockholders, applies only in cases where there is actual insolvency; and that up to the time that actual insolvency occurs, the doctrine of a trust fund does not operate. While this seems to be the rule laid down by the Supreme Court of the United States, and by several other Federal Courts, yet, in the leading cases cited by the defendants, wherein it was held that stockholders were not liable for dividends received from a National Bank when the capital was impaired thereby, but the bank at the time was not actually insolvent, it is implied that the directors who declared the dividend would be held to a different liability, and may be held to answer for any illegal act in this respect (McDonald v. Williams, 174 U. S. 397); and the particular provisions

of the Nevada Statute above quoted seem to determine exactly what this liability is. If this view is correct, the directors who declared this dividend are liable to the receiver for the amount thereof. The directors who were present at that meeting were Barnette, Wood, McGinn, Brumbaugh, Jesson, Jackson and Yarnell; and of these, Wood, McGinn, Brumbaugh and Jesson are defendants in this action.

There is one other charge in the complaint upon which it is sought to hold some of the defendants liable, namely: that they allowed Barnette to withdraw the special deposit of $200,000.00 and thus prefer himself over the other creditors of the bank. It seems, however, that he was entitled to this amount, under the terms of the agreement entered into between the partnership and the corporation, and whether or not that agreement was a proper one, it was entered into long prior to the time that any of the directors holding office at the time of the withdrawal were elected, with the exception of Jesson. There has been no reason shown why subsequent directors should have questioned the legality of this contract, or have made investigation concerning it, and they undoubtedly were entitled to rely upon conditions as they existed at the time they took office, without inquiring into the acts of their predecessors. As a matter of fact, the deposit was left with the corporation much longer than was contemplated by the original agreement, and the directors in office at the time it was withdrawn do not seem to have been negligent in permitting its withdrawal.

Findings of fact and conclusions of law and a de-

cree may be prepared in accordance with these views, finding against the defendants in office at the time the dividend was declared, for the amount thereof, and also against those in office at the time of the purchase of stock, for the amounts found to have been improperly taken over by the corporation. The aggregate of these is $21,000.00, and it appears that the defendant Jesson was in office during all this time, and therefore is liable for this amount. The defendants are thus liable as follows:

For stock taken from March to September 12, 1908, Jesson for $13,400.00;

For stock taken from September 12 to October 13, 1908, Jesson and Hill for $1500.00;

For stock taken October 13, 1908, to March 13, 1909, Jesson, Hill and Peoples for $1100.00;

For stock taken from March 13, 1909, to September 12, 1909, Jesson, Hill and Brumbaugh for $1000.00;

For stock taken from September 12, 1909, to October 12, 1909, Jesson, Brumbaugh and McGinn, $3000; and

For stock taken thereafter, Jesson, McGinn, Brumbaugh and Wood for $1000.00.

Filed:

FULLER, D. J.

[Endorsed]: No. 1756. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of Washington-Alaska Bank, a Corporation, Plaintiff, vs. J. A. Jesson et al., Defendants. Opinion. Filed in the District Court, Terri-

tory of Alaska, 4th Div. Jun. 3, 1914. Angus McBride, Clerk.

In the District Court for the District of Alaska, Division No. 4, at Fairbanks.

United States of America,
District of Alaska,
Division No. 4,—ss.

CERTIFICATE.

I, J. E. Clark, Clerk of the District Court for the District of Alaska, Division No. 4, hereby certify that the foregoing and hereto attached twenty-five pages of typewritten matter, numbered from 1 to 25, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the original Opinion in cause No. 1756, entitled:—F. G. Noyes, Receiver of Washington-Alaska Bank, a corporation, Plaintiff, vs. J. A. Jesson, D. H. Jonas, David Yarnell, Dan Ryan, C. J. Robinson, John L. McGinn, R. C. Wood, M. H. McMullen, C. E. Claypool, Robert Sheppard, Hans Stark, John Flygar, John P. Anderson, E. R. Peoples, James W. Hill, Ray Brumbaugh, J. A. Jackson, John A. Clark, J. A. Healey, George Preston, B. R. Dusenbury and L. N. Jesson, Defendants, as the same appears on file in my office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this thirtieth day of April, 1915.

J. E. CLARK,
Clerk.
By Sidney Stewart,
Deputy.

[Endorsed]: No. 1756. In the District Court for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver of Washington-Alaska Bank, Plaintiff, vs. J. A. Jesson et al., Defendants. Certified Copy of Opinion.

[Endorsed]: No. 2528. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 3, 1915. F. D. Monckton, Clerk.

[Certified Copy of Stipulation as to Preparation of Transcript on Appeal.]

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 1756.

F. G. NOYES, Receiver, etc.,

Plaintiff,

vs.

J. A. JESSON et al.,

Defendants.

It is hereby stipulated and agreed by and between the plaintiff and defendant and their respective attorneys that the Clerk of the above-entitled court, in the preparation of the transcript on appeal, may correct all clerical errors;

And it is further stipulated and agreed that the Clerk of the above-entitled court shall insert in their proper places copies of the exhibits given and offered upon the trial of the above-entitled cause, as specified by the attorneys, and now in the possession of said clerk, as it appears from the Bill of Ex-

ceptions that said exhibits were introduced in evidence; and that the depositions introduced upon the trial of the above-entitled cause, upon the return of this Court to Fairbanks, Alaska, together with the exhibits attached thereto, shall be inserted in the said Bill of Exceptions and made a part thereof in the places where it is shown in said Bill of Exceptions said depositions were read in evidence.

And it is further agreed between the parties, that in the preparation of the transcript on appeal, that all mention of the Court taking recesses and an adjournment from day to day, may be omitted there from.

Dated at Iditarod, Alaska, this 6th day of July, 1914.

O. L. RIDER,
Attorney for Plaintiff.
McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Defendants Wood, Hill, Peoples, Brumbaugh, McGinn & J. A. Jesson.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jul. 6, 1914. Angus McBride, Clerk.

In the District Court for the District of Alaska, Division No. 4, at Fairbanks.

United States of America,
District of Alaska,
Division No. 4,—ss.

CERTIFICATE.

I, J. E. Clark, Clerk of the District Court of the District of Alaska, Division No. 4, hereby certify that the foregoing and hereto attached two pages of typewritten matter, numbered from 1 to 2, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the original Stipulation as to Preparation of Transcript on Appeal, in cause No. 1756, entitled: F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants, as the same appears on file and of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this fourth day of May, 1915.

[Seal] J. E. CLARK,
Clerk.
By Sidney Stewart,
Deputy.

[Endorsed]: No. 1756. In the District Court, for the Territory of Alaska, Fourth Division. F. G. Noyes, Receiver, etc., Plaintiff, vs. J. A. Jesson et al., Defendants. Certified Copy of Stipulation as to Preparation of Transcript on Appeal.

[Endorsed] No. 2528. United States Circuit Court of Appeals, for the Ninth Circuit. Filed Jun. 3, 1915. F. D. Monckton, Clerk.

No. 2528

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation, organized under the Laws of the State of Nevada,

Appellee.

BRIEF OF APPELLANTS.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
Of Counsel.

Filed this.....day of May, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

VS.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation, organized under the Laws of the State of Nevada,

Appellee.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

"This is an action by the receiver of an insolvent "bank against the various defendants, charging them "with different wrongful and negligent acts and con- "duct, whereby the bank was injured and its assets

" wasted so that it became unable to pay its creditors,
" and asking that an accounting be had and judgments
" rendered against the defendants for such amounts
" as may be found due from them respectively.

"It is alleged that the Fairbanks Banking Company
" was organized as a corporation, under the laws of
" the State of Nevada, on January 21, 1908, and began
" business at Fairbanks on March 15, 1908, and con-
" tinued as such until receivers were appointed to take
" over its assets and wind up its business on January
" 5, 1911, the name of the corporation, however, hav-
" ing been changed to that of Washington-Alaska Bank
" on September 14, 1910. The defendants were officers
" and directors of the corporation during the time it
" was carrying on business, and it is by reason of
" wrongful and negligent acts in their capacity as such
" officers and directors that the plaintiff seeks to hold
" them liable in this action.

"It is charged that the defendants unlawfully began
" to diminish the assets and capital stock of the cor-
" poration, by surrendering to subscribers stock cer-
" tificates which had been issued to them, and paying
" them the amounts of their subscriptions, such sur-
" rendering of stock beginning June 30, 1908, and
" being made at various times until October 25, 1910,
" the total amount of stock thus cancelled and sur-
" rendered amounting to $56,000.00.

"Another charge is that on April 12, 1910, the Di-
" rectors of the Fairbanks Banking Company declared

" a dividend of twenty per cent. upon the outstanding " capital stock, amounting to $33,720.00, and that on " this date the company had no undivided profits or " surplus in excess of its liabilities, but, on the con- " trary, was in an insolvent and failing condition.

"It is alleged that the Receiver has taken charge " of the assets of the company, and so far as possible " reduced them to cash and distributed them among " the creditors, but that he has been able, so far, " to pay them only fifty per cent. of the amounts due " them, and that after exhausting all the remaining " assets and applying them upon the corporation's in- " debtedness, there will still remain a large sum due " to the creditors of the bank.

"The defendants who have appeared by their an- " swers have denied all misconduct and acts of negli- " gence on their part, and have further set up that " after the appointment of a receiver, E. T. Barnette, " and his wife transferred to the receiver a large " amount of property for the purpose of paying all " the obligations of the corporation, and that the same " was accepted by the receiver, under the order of " this Court, in full settlement of any liability on his " part; and that inasmuch as he was at all times a " director with the answering defendants, and jointly " liable with them for any acts of misconduct or negli- " gence, that this transaction operates as a bar to any " suit against them; and further, that the receiver has " received certain sums of money from the property

" thus transferred by Barnette and his wife, and that " the sums so received exceed the sum for which any " answering defendant is liable."

The foregoing language, taken from the opinion of the court, indicates briefly the questions involved on this appeal.

The complaint was voluminous, and as we contend multifarious, but the findings of the court upon most of the questions presented were in favor of the defendants. It found in favor of the plaintiff, however, upon two propositions, first, that the surrender of the stock above referred to was unlawful, and that the directors and officers in office at the time were responsible therefor; and second, that the declaration of the dividend of April 12, 1910, was unlawful, and the directors and officers in office at that time responsible therefor. The court also found against the defendants' contention that the liability of the defendants was discharged by the conveyance of property by Barnette and his wife to the receiver.

The defendants were at various times directors or officers of the bank.

Judgment was rendered against the various defendants as follows:

Against Wood, McGinn, Brumbaugh and Jesson for $33,720.00, by reason of the declaration and payment of the dividend on April 12, 1910.

Against Jesson for $13,400.00 for surrender of shares between July 13, 1908, and September 12, 1908.

Against Jesson and Hill for $1500.00, for surrender of shares between September 13 and October 13, 1908.

Against Jesson, Hill and Peoples for $1100.00, for surrender of shares between October 14, 1908, and March 13, 1909.

Against Jesson, Hill and Brumbaugh for $1000.00, for surrender of shares between March 14 and September 12, 1909.

Against Jesson, Brumbaugh and McGinn for $3000.00, for surrender of shares between September 13, 1909, and October 12, 1909.

Against Jesson, McGinn and Brumbaugh for $1000.00, for surrender of shares between October 13, 1909, and January 18, 1910 (p. 216).

The Washington-Alaska Bank, of which the plaintiff is the receiver, was incorporated under the laws of the State of Nevada on the 21st day of January, 1908, with an authorized capital of $300,000.00, divided into 3000 shares of the par value of $100.00 each. The Bank was originally incorporated under the name of the Fairbanks Banking Company. Subsequently, by amendment to the articles of incorporation, the name was charged to Washington-Alaska Bank (p. 189), and it commenced business in the town of Fairbanks on March 16, 1908, with a subscribed capital of $206,000.00. Part of this was paid for in

cash, part in property, and the balance by the promissory notes of the subscribers (p. 190). Prior to January 21, 1908, subscriptions for the capital stock of the new Bank were circulated, and among other names subscribed thereto were those of E. T. Barnette, 440 shares, R. C. Wood, 220 shares, James W. Hill, 220 shares (the name of Wood being subscribed by the said E. T. Barnette) (p. 190).

Previous to the incorporation of the Bank, Barnette, Hill and Wood, as copartners, had been conducting a banking business in the town of Fairbanks under the firm name and style of Fairbanks Banking Company. On December 12, 1907, the Fairbanks Banking Company, the copartnership, owing to financial difficulties brought about by the panic of that year, was compelled to suspend business and close its doors (p. 190). The capital of the partnership was $200,000.00, which had belonged to Barnette, and the agreement existing between the partners was, that the profits of the partnership were to be divided, one-half to Barnette and one-fourth each to Hill and Wood (p. 191).

In the forepart of January, 1908, a large number of business, professional and mining men of Fairbanks met at that place, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, the partnership, and at said meeting negotiations were begun by said proposed incorporators with

said copartnership for the purchase of the same. At that meeting a Committee was also appointed to go into the details of the reorganization of the Fairbanks Banking Company, and report a basis upon which the business should be taken over (p. 191).

The Committee met on the 5th day of January, 1908, and after investigating the affairs of the Bank, made the following report to be presented for consideration by the proposed new corporation:

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent. per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

(b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amounts subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees, and on which a valuation of $288,000.00 in excess of its liabilities was placed, be accepted.

(e) That all notes, properties and securities which said board of trustees placed in the No. 3

or doubtful class remain the property of the old institution.

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

(h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the *Caustens* vs. *Barnette* suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer and secretary.

(j) That the number of board of directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30, and December 31 (p. 191).

On January 6, 1908, the foregoing report was submitted to the proposed incorporators at a meeting. The report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the record of the meeting. At this meeting the subscription list, set forth in paragraph 3 of the amended complaint (page 4), was presented and signed by the proposed incorporators, setting forth the amount for which each respectively subscribed. At this meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that the partnership would turn over to the corporation the property of the parnership, on the terms specified in the report; and the proposed incorporators on behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of the partnership (p. 194).

On February 8, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held, for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and at said meeting said stock notes were subscribed by said subscribers of stock and delivered to said corporation (p. 194). At the time of this meeting the articles of incorporation had not yet been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a board of directors and twelve directors were accordingly elected, and it was agreed that they should

act as a board until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws adopted (p. 194). The Articles of Incorporation did not arrive in Fairbanks until some time in the month of March, 1908. Immediately thereafter a meeting of the stockholders was held, at which by-laws were adopted, a board of directors elected, and a resolution passed to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the board of directors. At that meeting the subscription list was read and the motion was carried that the proposed offers of subscription be accepted by the corporation, and the persons subscribing declared to be stockholders of the company (p. 235). The defendant Wood was not at the meeting (p. 195). Immediately after the adjournment of the stockholders' meeting, the Board of Directors met, organized and adopted a resolution ratifying the arrangement as to taking over the assets, property, business and liabilities of E. T. Barnette, James W. Hill and R. C. Wood, upon the terms and conditions set forth in the minutes of the subscribers' meeting, held January 5, 1908 (p. 228), except that the resolution providing for the payment of the accrued interest on the partnership notes up to February 15, 1908, was amended so as to read "March 15, 1908."

On the 16th day of March, 1908, a written agreement was entered into between the corporation and

the partners, and on the same day was signed by Barnette and Hill, and also on behalf of the Bank, whereby the valuation of the resources of the partnership was fixed at $790,940.31, and its liabilities at $538,940.31, leaving an excess of $252,000.00 belonging to Barnette, Hill and Wood. In this agreement Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets so in excess of liabilities, except that $200,000.00 thereof should be placed to the credit of Barnette as a special deposit with said corporation (p. 196). The object of this special deposit was to protect the corporation against certain litigation which was then pending, and which affected the Gold Bar stock, one of the assets of the copartnership hereafter referred to (p. 49). By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood, was fixed at $52,000.00, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares.

At the time this agreement was entered into Barnette was President and Director of the corporation, and defendant Jesson also a director (p. 197). The papers for the transfer were left to the Executive Committee and under their direction the written agreement was prepared, submitted to the Board of Directors and approved. According to the by-laws the Executive Committee had the same powers as the board of directors, subject to approval by the board. At the time the written agreement was signed and

executed, and during all the negotiations leading up to the making of it, the defendant Wood was in Seattle, Washington (p. 198). On Wood's return to Fairbanks in April, 1908, he signed the agreement (p. 198).

Of the loans and discounts transferred to the corporation, a large amount was past due and of this amount past due $69,908.94 was at the time of the trial in the hands of the receiver and unpaid. It included two notes of the Tanana Electric Company, aggregating $27,997.38. These last notes depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same. The board of directors and officers of the Bank accepted said notes of the Tanana Electric Company and paid therefor the sum of $27,997.38 (p. 199).

Among the other assets of the partnership accepted by the officer and directors, was four-fifths (4/5) of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which stock was accepted and paid for at the valuation of $341,949.00. This stock was at all times during the existence of the Bank carried as an asset in that sum (pp. 199, 204).

In order to find that the corporation was not solvent at the time the surrenders of stock were made and the dividend declared, it was necessary for the plaintiff to prove that this past due paper was not worth

its face value. This included establishing that the Tanana Electric Company notes had no value. It was also necessary to prove that the Gold Bar Lumber stock was not worth $341,949.00.

Wood was elected cashier on March 12, 1908. There was a controversy as to when he actually took office, as he did not return to Fairbanks until April, 1908. He continued as cashier until June 30, 1908, at which time Dusenbury was elected to succeed him (p. 200). At that time Wood tendered his resignation and demanded that there be paid to him the amount of his interest in the partnership assets, to wit, $13,000.00. A certificate for 130 shares of the capital stock had been written up in his name, but never detached from the stock book (p. 200). On June 30th a certificate of deposit was issued to him in the sum of $13,000.00, and the shares of capital stock were on the same date charged to treasury stock. Subsequently Wood drew out in cash this sum of $13,000.00 (p. 201).

On March 23, 1908, the accrued interest on the loans transferred to the corporation was computed to March 15, 1908, the amount being $39,642.81, and one-half of this was placed to the credit of Barnette, one-fourth to the credit of Hill and one-fourth to the credit of Wood, and subsequently the same was paid to Barnette, Wood and Hill in cash. At this time the following defendants were officers of the Bank:

Jesson, Hill and Wood (p. 203), Jesson being the only director (p. 22).

On the 14th day of September, 1908, the executive committee passed a resolution to the effect that the corporation would not take over any more stock of the stockholders. This resolution was ratified by the board of directors on the 14th of October, 1908. Notwithstanding this resolution thirty-eight different surrenders of stock were made by stockholders aggregating 43,000 shares, exclusive of Wood's stock, the last alleged surrender being the McGinn stock, of the par value of $10,000.00, for which the sum of $6000.00 in cash was paid, in the manner hereafter described (p. 206).

On November 18, 1908, Strandberg Brothers owning 100 shares, Emma Strandberg 10 shares and B. E. Johnson 10 shares, surrended their stock in part payment of a loan previously made, the directors believing at the time that the loan was precarious (p. 206).

On February 3, 1909, the executive committee again resolved that the officers of the bank be directed to say that "the corporation did not desire to buy in its stock at present." This resolution was ratified by the board of directors on February 13, 1909 (p. 206).

On March 15, 1909, one Parkin and one Tackstrom requested the executive committee of the Bank to buy their stock. The executive committee thereupon again announcd its policy by resolving "it was the sense of "the meeting that the bank observe the rule estab-

"lished at a previous meeting of the board wherein "it was declared not to buy in any more stock." This resolution was approved and ratified by the board of directors on April 12, 1909 (p. 207).

John L. McGinn was the owner of 100 shares of the corporation, and on the 13th day of October, 1910, demanded the right to inspect its books and papers, and threatened that unless this right was granted him immediately, he would make application for an order permitting him to do so and for the appointment of a receiver of said bank. The directors fearing that information obtained by such an investigation would be used by McGinn in promoting the interests of the First National Bank, and if such information was refused and any litigation started, it would possibly start a run of its customers, authorized the cashier to loan a purchaser sufficient funds to purchase the stock of McGinn; one of the directors stating at the time that he had a purchaser who would purchase said stock for the sum of $6000.00, but it would be necessary for him to borrow money to complete said purchase. As the matter was urgent and the purchaser was not available, the cashier purchased the stock in his own name and gave his note to the bank for the amount and paid to McGinn $6000.00 for his 100 shares of the capital stock. On October 25, 1910, the cashier, without the knowledge of any of the directors, canceled his note, charged the amount to the bank, and surrendered the stock (p. 208).

In May, 1909, the Fairbanks Banking Company and the Washington-Alaska Bank of Washington, then doing business in Fairbanks, each purchased one-half of the capital stock of the First National Bank of Fairbanks, Alaska, for which each paid $62,500.00, and continued to own and hold the stock until May, 1910. About May, 1910, the Fairbanks Banking Company sold the entire capital stock of the First National Bank to defendants, Wood and McGinn, for the sum of $125,000.00, and received said amount in payment therefor, delivering to them the capital stock of said First National Bank (p. 211). At the time the banks purchased the First National stock they gave and delivered to R. C. Wood an option to purchase the same on or before June 1, 1910, for the sum of $125,000.00, and the sale to Wood and McGinn was made pursuant to that option (p. 211).

On September 14, 1909, the Fairbanks Banking Company purchased the entire capital stock of the Washington-Alaska Banking Company of Washington, paying therefor the sum of $250,000.00. The capital stock of the bank purchased was of the par value of $150,000.00 (pp. 211, 212).

On April 12, 1910, the Fairbanks Banking Company declared a dividend of twenty per cent. (20%) on its then outstanding capital stock of $168,600, which dividend amounted to $33,720.00, and was paid to the stockholders of said bank either in cash or by

crediting the amount thereof upon notes owing by said stockholders to said bank (p. 214).

On October 1, 1910, the Fairbanks Banking Company and the Washington-Alaska Bank of Washington, combined, at which time the Fairbanks Banking Company took over the assets of the Washington-Alaska Bank of Washington and assumed and agreed to pay its outstanding liabilities. Thereafter the Washington-Alaska Bank of Washington, ceased to exist or do business as a bank, and the Fairbanks Banking Company by amendment to its articles of incorporation, changed its name to the Washington-Alaska Bank of Nevada, and continued thereafter to transact business under said name at Fairbanks, Alaska, until the appointment of a receiver (p. 214).

At the time that the bank failed E. T. Barnette, the President, was away from Fairbanks. He subsequently returned and together with his wife executed two trust deeds conveying to the receivers certain property owned by him in Mexico and in Alaska, upon certain trusts herein referred to. Barnette and his wife presented a petition to the court for an order directing the receiver to accept and hold these properties in trust (p. 939). The court being of the opinion that the matter should originate with the receiver, directed that the papers be turned over to the receivers, there being then two, for their consideration (p. 949).

The receivers subsequently came into court and

asked for instructions, reciting the conveyance of the lands to them, and stating the object to be to secure and ultimately pay the depositors and owners of unpaid drafts of the defendant bank, any balance that may remain, after the property and assets of said bank are collected and applied in payment thereof (p. 950). They then go on to say:

> "We are of the opinion that if these deeds are accepted, it will be impracticable to proceed as contemplated, to fix a liability against E. T. Barnette one of the grantors, in favor of the creditors of said bank, by action in the court here. So far as we now know, the property conveyed to us as trustees, located at Fairbanks, and on the nearby creeks, is all the property owned by said E. T. Barnette in Alaska, that would be subject to seizure on a judgment against him in this court. The deed contains some valuable real estate that is the separate property of Isabelle Barnette" (p. 951).

The Court then made its order directing the receivers to accept the trust deeds (p. 952).

The deed to the Mexican property recited:

> "Whereas the first parties are informed and believe that the second parties, as receivers of the said bank, are about to commence an action in the said court for and on behalf of the creditors of the said Washington-Alaska Bank, against the said E. T. Barnette, one of the first parties, to recover from him the amount of any deficiency that may be ascertained as between the claims of the creditors above mentioned and the amount realized out of the property and assets of the said Washington-Alaska Bank, said action to be based on the lia-

bility of the said E. T. Barnette, to said creditors of the said bank, arising out of his management of the affairs thereof, from March, 1908, up to and including January 5th, 1911, as its president, and one of the directors thereof;

Now, Therefore, in consideration of the premises and of the liability of the said E. T. Barnette to the creditors of the said Washington-Alaska Bank, growing out of his connection and management of the business affairs thereof as its president and one of the directors during the period of the time last mentioned, and for other good and valuable considerations, the said parties of the first part have granted, and do hereby grant and convey to the parties of the second part and their successors in the office of Receiver of the said Bank, in trust, for the uses and purposes hereinafter specified, all their right, title and interest in and to the following described lands and real estate and the appurtenances thereunto belonging, situate in the Municipality and District of Santiago, Ixcuinita, Territory of Tepic, Republic of Mexico, to wit: * *

To Have and to Hold the said lands and tenements in trust and upon the following terms and conditions, that is to say:

That Whereas on or about the 18th day of March, 1908, the Fairbanks Banking Co., a corporation, incorporated under the laws of the State of Nevada and authorized to do a banking business in the City of Fairbanks, Territory of Alaska, commenced to transact a general banking business at said point under their said charter of incorporation, and continuously maintained and operated a bank at said place from the said date until on or about January 5th, 1911; that on or about the 8th day of October, 1910, the name of the said Fairbanks Banking Co. was under and by virtue of the laws of the State of Nevada, duly changed to that of the Washington-Alaska Bank, its present

name, and from that date the business of the said Fairbanks Banking Co. was continued under the name of the Washington-Alaska Bank until its failure as aforesaid; that during all of said period said E. T. Barnette was the president and one of the directors of said Fairbanks Banking Co., and that said Washington-Alaska Bank, and as such was active and influential in the control and management of its business affairs; that on or about the said 5th day of January, 1911, the said Fairbanks Banking Co., now called Washington-Alaska Bank, became insolvent, and receivers were appointed to take charge of the property and assets thereof in the court and cause above mentioned; that it has at all times since appeared, and is now apparent that there is and will be a large deficiency as between the obligations of the said banking institution to its depositors and the owners of unpaid drafts on the one side, and the proceeds of its property and assets on the other; that by reason of all the premises the said E. T. Barnette has heretofore assumed, and does now assume to take upon himself the obligation of paying the depositors and owners of unpaid drafts of the said banking institution, and their representatives, the second parties herein and their successors or successor in the office of receivers or receiver, any deficit that may be hereafter ascertained as between the amounts due to such depositors and owners of unpaid drafts, from the said banking institution on the 5th day of January, 1911, together with 6% per annum interest thereon from said date, and the amount realized out of the property and assets of the said bank and paid to such creditors; that the amount of such deficit is not known at this time, and cannot be ascertained at any particular period of time in the near future that can now be named, but will be so ascertained by or before November 18, 1914" (pp. 1029-1033).

It provided that actual possession was not to be taken until November 18, 1914. The deed to the Alaska property contained similar recitals, but provided for immediate possession of the property by the receivers (p. 1043), and gave them an absolute right of sale on the 18th day of November, 1914, if the creditors of the bank had not been paid in full, either out of the property and assets of the bank as administered by the receivers, or otherwise, or by the said E. T. Barnette. Prior to the last mentioned date a small portion of the property was sold with the consent of the parties to the deed.

The amount collected in money and the value of the properties transferred was more than the amount claimed against any of the defendants. It is claimed by the defendants that this transaction amounted to an accord and satisfaction, and they were entitled to the benefit accordingly.

It is claimed by the plaintiff that the legal effect of the transaction was a covenant not to sue. He thus sets it up in his reply:

> "He alleges that in the institution and prosecution of this suit he is acting under order of court; he admits that the said Barnette was not joined as a party defendant in this action, and he alleges that the reason therefor is that the acceptance of said trust deeds operated as an agreement not to sue said Barnette prior to November 18th, 1914" (p. 186).

There are, then, three principal questions for consideration here:

1. Had the defendants the right to repurchase the stock?

2. Had they the right to declare the dividend?

3. Have they been released?

The points which we propose to make are the following:

1. The complaint is multifarious.

2. The complaint is defective, for the reason that it failed to plead the law of Nevada which it was necessary to prove in order to warrant a recovery against the defendants on account of anything they did in reference to the dividend or purchase of the stock.

3. The purchase of the stock by the corporation was not in violation of the general law.

4. The purchase of the stock was not in violation of the law of Nevada.

5. When a corporation buys shares of its own capital stock, its capital stock is not reduced by that amount, nor is the stock merged.

6. The purchase of the stock was without the knowledge and against the instructions of the directors.

7. The directors are not presumed to have known of the purchase of the stock by the officers.

8. The judgment of the directors was conclusive as to the dividend.

9. The directors were entitled to believe the corporation in possession of a surplus at the time of the declaration of the dividend.

10. The directors were entitled to take the Gold Bar stock at its book value.

11. The directors were entitled to treat the Tanana notes as worth the amount at which the bank carried them.

12. The plaintiff must show that he represents creditors who were such at the time the dividend was declared and the stock purchased.

13. The transaction between Barnette and the receivers constituted an accord and satisfaction.

14. The transfer of assets to the receivers by Barnette, the co-tort-feasor of defendants, was pro tanto a satisfaction of any claim by the receiver against the defendants on account of such joint torts, and the property so transferred being in excess of the amounts found to be due from any of the defendants, they have been thereby completely discharged.

SPECIFICATION OF ERRORS.

The Court erred in overruling the motion of the defendants R. C. Wood, James W. Hill and John L. McGinn to strike from the files and records of this court and out of the case the complaint filed by the plaintiff herein, for the reason that said complaint contained more than one cause of action, and that the same were not separately pleaded.

Assignment of Error No. 1.

The Court erred in overruling the motions of said defendants to strike certain parts and portions of said complaint.

Assignment of Error No. 2.

The Court erred in overruling the demurrers of the defendants to the amended complaint.

Assignment of Error No. 3.

The Court erred in refusing to make the finding of fact set forth in paragraph XIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the value placed upon said assets of the partnership was the value placed thereon by the stockholders, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for

the purposes of the transfer, and not that the directors should exercise their individual judgment in determining the value of such assets.

Assignment of Error No. 8.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph XXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 18th day of September, 1908, Oscar Goetz was the owner of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without their fault, and in violation of the resolution hereinbefore in the preceding paragraph set forth, was cancelled by J. A. Jackson, assistant cashier of said bank, and the sum of $1,000 paid to said Goetz out of the funds of said bank, and said stock debited to treasury stock.

Assignment of Error No. 15.

The Court erred in refusing to make finding of fact set forth in paragraph XXIV of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 18th day of September, 1909, the said J. A. Jackson, assistant cashier, without the knowledge, consent, approval, or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive committee, debited treasury stock with the amount of G. A. Vedine's stock $500.

That at said time the said Vedine's name did not appear as a stockholder in the books of said bank, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Vedine for or on account of said transaction.

Assignment of Error No. 16.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXV of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 24th day of October, 1908, B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive ocmmittee and board of directors, debited treasury stock on account of McDonnell stock in the sum of $200. That at said time the said McDonnell's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any money whatsoever for or on account of any of the stock of said bank; and that no money was paid to said McDonnell for or on account of said transaction.

Assignment of Error No. 17.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXVII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That upon the 12th day of January, 1909, the said J. A. Jackson, without the knowledge, consent, approval, or acquiescence of the board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolutions, debited treasury stock on account of F. E. Johnson's stock in the sum of $200. That at said time the said Johnson's name did not appear as a stockholder in the books of said corporation, nor had any stock been issued to him, nor had he paid any moneys for or on account of any stock of said corporation bank, and no money was paid to said F. E. Johnson for or on account of said transaction.

Assignment of Error No. 18.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 9th day of February, 1909, John Clifford, was the owner of two shares of the outstanding capital stock of said corporation, and upon said date the said B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore set forth, cancelled said stock, and debited treasury stock with the sum of $200, and said Dusenbury paid the said Clifford out of the funds of said bank the said sum of $200.

Assignment of Error No. 19.

The Court erred in refusing to make the finding of fact set forth in paragraph XLII of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 10th day of June, 1909, Hart & McConnell were the owners of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the consent, knowledge, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, which were all well known to the officers of said bank, was cancelled by J. A. Jackson, assistant cashier, and the sum of $1000.00 was credited to the deposit account of said Hart & McConnell on the books of said bank, and said stock debited to treasury stock.

Assignment of Error No. 20.

The Court erred in refusing to make the finding of fact set forth in paragraph XLIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 21st day of August, 1909, Louis and Oscar Enstrom were the owners of ten shares of the outstanding capital stock of said Fairbanks Banking Company, and upon said date the said stock, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, was cancelled by R. B. Dusenbury, its cashier, and the sum of $1000.00 was placed to the credit of said

Louis and Oscar Enstrom on the books of the bank, and said stock debited to treasury stock.

Assignment of Error No. 21.

The Court erred in refusing to make the finding of fact set forth in paragraph XLIV of defendants' proposed findings of fact and conclusions of law, as follows:

That in the month of May, 1909, H. B. Parkin, who was the owner of ten shares of the outstanding capital stock of said corporation, sold his stock to R. B. Dusenbury, cashier, and the said Dusenbury paid therefor the sum of $1000. That said stock was not transferred on the books of said company to said R. B. Dusenbury, but remained on the books in the name of said H. B. Parkin. That thereafter some officer of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, made a memorandum note for the sum of $1000.00 on account of the Parkin stock, to which said memorandum note some officer of said bank signed the name of D. Michie; that thereafter, and on the 28th day of October, 1909, J. A. Jackson, then cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions which had theretofore been adopted by said board of directors, of which the said J. A. Jackson had full knowledge, cancelled the said memorandum note, and debited treasury stock with the sum of $1000.00.

Assignment of Error No. 22.

The Court erred in refusing to make the finding of fact set forth in paragraph XLV of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 28th day of October, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the said hereinbefore mentioned resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Alex Cameron with $100.00 and also debited treasury stock $200.00 on account of Edith McCormick, and also debited treasury stock on account of J. W. McCormick, in the sum of $200. That at said time the said Cameron, and the said McCormicks' names did not appear as stockholders in the stock-books of said corporation, nor had any stock been issued to them, nor had they paid any money whatsoever for or on account of any stock of said bank; and that no money was paid to said Cameron or to said McCormicks for or on account of said transaction.

Assignment of Error No. 23.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 10th day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned

resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Francis H. Taylor, in the sum of $500. That at said time the said Francis H. Taylor's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Taylor for or on account of said transaction.

Assignment of Error No. 24.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVII of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 23rd day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of the hereinbefore mentioned resolutions, debited treasury stock on account of McGowan & Clark stock in the sum of $500. That at said time the said McGowan & Clark's name did not appear as stockholders in the books of said bank, nor had any stock been issued to them, nor had they paid any money for or on account of any of the stock of said corporation; and that no money was paid to said McGowan & Clark for or on account of said transaction.

Assignment of Error No. 25.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVIII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That upon the 18th day of January, 1910, Horton & Dunham were the owners of five shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore mentioned, was cancelled by J. A. Jackson, cashier, and the same was debited to treasury stock, and the sum of $500 placed to the credit of said Horton & Dunham on the books of said bank. That at said time the said Horton & Dunham were indebted to said Fairbanks Banking Company.

Assignment of Error No. 26.

The Court erred in refusing to make the finding of fact set forth in paragraph LIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That at the time of the taking over of all of the stock hereinbefore mentioned and in the amended complaint mentioned, the assets of said corporation exceeded its liabilities, and the earnings and net profits on hand greatly exceeded the par value of the stock so surrendered, cancelled and returned to the treasury stock of said corporation.

Assignment of Error No. 28.

The Court erred in refusing to make the finding of fact set forth in paragraph LIV of defendants'

proposed findings of fact and conclusions of law, as follows:

> That on the 21st day of September, 1909, the assets of said corporation, not including the interest which had been earned but not paid and which was not carried as an asset, exceeded the liabilities in the sum of $23,032.03.

Assignment of Error No. 29.

The Court erred in refusing to make the finding of fact set forth in paragraph LV of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 28th day of October, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $26,857.68.

Assignment of Error No. 30.

The Court erred in refusing to make the finding of fact set forth in paragraph LVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 10th day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $8,896.75.

Assignment of Error No. 31.

The Court erred in refusing to make the finding of fact set forth in paragraph LVII of defendants' proposed findings of fact and conclusions of law as follows:

> That on the 23d day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $29,890.74.

Assignment of Error No. 32.

The Court erred in refusing to make the finding of fact set forth in paragraph LVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 18th day of January, 1910, the assets of said corporation, not including interest which had been earned but not paid and which was not included or carried as an asset, exceeded its liabilities in the sum of $11,984.63.

Assignment of Error No. 33.

The Court erred in refusing to make the finding of fact set forth in paragraph LIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That it has not been shown that the creditors who were existing at the time of the surrender of said stock and the cancellation thereof as hereinbefore set forth have not been paid in full by the Washington-Alaska Bank of Nevada, save and except that on July 1, 1908, were existing cred-

itors, who have not since been paid in full, to the amount of $4,000, and of said sum one-half thereof has since been paid by the receiver.

Assignment of Error No. 34.

The Court erred in refusing to make the finding of fact set forth in paragraph LX of defendants' proposed findings of fact and conclusions of law, as follows:

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed that they had a right to purchase and take back the stock of said corporation, and were advised by the attorneys of said bank that they had such right.

Assignment of Error No. 35.

The Court erred in refusing to make the finding of fact set forth in paragraph LXI of defendants' proposed findings of fact and conclusions of law, as follows:

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed, and had a right to believe, that the assets of said bank exceeded its liabilities and there were net profits which greatly exceeded the par value of the stock so surrendered and cancelled.

Assignment of Error No. 36.

The Court erred in refusing to make the finding of fact set forth in paragraph LXII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That all of said stock so debited to treasury stock was thereafter carried as an asset of the corporation, and it was not intended by said transaction to reduce the capital stock of said corporation or to retire the same; but, on the contrary, it was the intention to reissue the same.

Assignment of Error No. 37.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 24th day of March, 1909, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska, in regard to foreign corporations doing business therein filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding capital stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $173,600.

Assignment of Error No. 38.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIV of defendants' proposed findings of fact and conclusions of law, as follows:

> That on September 14, 1909, the Fairbanks Banking Company, in compliance with the laws

of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement showed that upon said date the outstanding capital stock of said corporation was of the par value of $172,600.

Assignment of Error No. 39.

The Court erred in refusing to make the finding of fact set forth in paragraph LXV of defendants' proposed findings of fact and conclusions of law, as follows:

That on September 10, 1910, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $169,600.

Assignment of Error No. 40.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVI of defendants' proposed findings of fact and conclusions of law, as follows:

That the end of the fiscal year of the Washington-Alaska Banking Company, was the 31st day of December of each year, and at said time it

had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their officers were bad and uncollectible, and which had not been charged off during said fiscal year.

Assignment of Error No. 41.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVIII of defendants' proposed findings of fact and conclusions of law, as follows:

That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of the loans and discounts of said bank that he considered bad and uncollectible. That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $8,599.59. That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided

profits for the fiscal year ending December 31, 1909, amounting to the sum of $56,106.97.

Assignment of Error No. 43.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIX of defendants' proposed findings of fact and conclusions of law, as follows:

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

Assignment of Error No. 44.

The Court erred in refusing to make the finding of fact set forth in paragraph LXX of defendants' proposed findings of fact and conclusions of law, as follows:

That the said R. C. Wood was a man of high standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the conditions of said Washington-Alaska Bank, and of the securities held by it for loans made by, and due to, said bank.

Assignment of Error No. 45.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

That at the end of the fiscal year 1909, the said R. C. Wood requested J. A. Jackson, cashier of the

Fairbanks Banking Company, to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $24,937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of $9,881.78.

Assignment of Error No. 48.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIV of defendants' proposed findings of fact and conclusions of law, as follows:

That said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank, and the standing of its debtors.

Assignment of Error No. 49.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXV of defendants'

proposed findings of fact and conclusions of law, as follows:

> That at the meeting of the board of directors of said Fairbanks Banking Company, held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts heretofore mentioned had been charged off, were presented by the officers of said bank to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed.
>
> That said statement showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of $56,106.97.
>
> That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending December 31, 1909, after deducting all the bad debts, was the sum of $9,881.78.

Assignment of Error No. 50.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That after said sum of $25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of said bank at said time amounted to the sum of $34,828.55.

Assignment of Error No. 53.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That at the time of the declaration of said dividend, and after the adding of said sum of $25,000 to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of $34,828.55, and the directors at said time honestly and in good faith believed that the undivided profit of said Fairbanks Banking Company was the sum of $34,828.25, and said directors were so advised by the officers of said bank.

Assignment of Error No. 54.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the profit of said Washington-Alaska Bank, Fairbanks Banking Company and First National Bank for the year ending December 31, 1909, was the sum of $131,332.91; and, after charging off bad debts on said three banks to the amount of $42,836.96, the net profits of said three banks for said year was $88,495.95.

Assignment of Error No. 55.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXI of defendants'

proposed findings of fact and conclusions of law, as follows:

> That the said Fairbanks Banking Company at the time of the declaration of the dividend was carrying the stock of the Gold Bar Lumber Company for the sum of $341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said property and the value thereof, had a right to believe that said property was worth said amount.

Assignment of Error No. 56.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of $27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

Assignment of Error No. 57.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That said dividend was declared by said directors of said bank in good faith and in the honest belief, and after the exercise of due care, that the undivided profits of said bank amounted to the said sum of $34,828.55, and that the values placed upon the assets of said bank was a true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

Assignment of Error No. 58.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That at the time of the suspension of the Washington-Alaska Bank of Nevada the said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of any of the matters and things set forth in plaintiff's amended complaint.

Assignment of Error No. 61.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVII of defendants' proposed findings of fact and conclusions of law, as follows:

> That as a result of said negotiations, and in full satisfaction of all the wrongs complained of in plaintiff's amended complaint, the said E. T. Barnette on the 18th day of March, 1911, executed an instrument in writing in which he admitted his liability to the creditors and depositors of said bank, and promised and agreed to pay all of the depositors of said bank in full not later than the 18th day of November, 1914, together with interest on all amounts due to creditors and depositors from the 4th day of January, 1911, until paid.

Assignment of Error No. 62.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That Isabelle Barnette was and is the wife of the said E. T. Barnette, and the said Isabelle Barnette was desirous of aiding her said husband in the payment of the creditors and depositors of said Washington-Alaska Bank of Nevada, and to that end joined her said husband in the promise to pay all the depositors and creditors of said Washington-Alaska Bank of Nevada on the terms set forth in the preceding paragraph.

Assignment of Error No. 63.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That said promise was made upon the distinct understanding that no litigation would be instituted against the said E. T. Barnette, or others for or on account of any of the matters and things set forth in the amended complaint, and for this purpose, and to prevent any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said Isabelle Barnette and E. T. Barnette on the 18th day of March, 1911, with the knowledge and consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers by order of this Court accepted the conveyance of title to an improved plantation containing 18,723 acres of land, situate in the Republic of Mexico, and certain improved and income producing business properties and lots situate in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situate in the Fairbanks Precinct, Territory of Alaska; all of which properties belonged at the time of said conveyance to said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 64.

The Court erred in refusing to make the finding of fact set forth in paragraph XC of defendants' proposed findings of fact and conclusions of law, as follows:

> That the property so conveyed by the said E.

T. Barnette and Isabelle Barnette situated in the Republic of Mexico was, at the time of said conveyance, of the value of $500,000.00. That at this time, owing to the unsettled conditions in the Republic of Mexico caused by rebellion and open warfare, it is difficult to determine what is the present value of said property situate in said Republic of Mexico, which said property is of great value, but the market value thereof cannot be determined at this time.

Assignment of Error No. 65.

The Court erred in refusing to make the finding of fact set forth in paragraph XCI of defendants' proposed findings of fact and conclusions of law, as follows:

That the property conveyed by the said E. T. Barnette and Isabelle Barnette in the town of Fairbanks, Territory of Alaska, is of the value of $25,000.

Assignment of Error No. 66.

The Court erred in refusing to make the finding of fact set forth in paragraph XCII of defendants' proposed findings of fact and conclusions of law, as follows:

That the value of the interest of the said E. T. Barnette and Isabelle Barnette in association placer mining claims situate in the Fairbanks Recording District, Territory of Alaska, and conveyed by them to said receivers, is the value of $20,000.

Assignment of Error No. 67.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the receiver has received from said mining properties and said town properties as rents, royalties and proceeds, up to the present time, the sum of $31,400.

Assignment of Error No. 68.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIV of defendants' proposed findings of fact and conclusions of law, as follows:

> That in said deed of said property in the Republic of Mexico it is expressly provided that said receiver may sell all or any part of said land at private sale on or after the 18th day of November, 1914, for the purpose of raising funds with which to pay the claims of the depositors and creditors of said bank then remaining unpaid, and, out of the proceeds thereof, said receiver is directed to pay all the claims of depositors and creditors of said bank then remaining unpaid.

Assignment of Error No. 69.

The Court erred in refusing to make the finding of fact set forth in paragraph XCV of defendants' proposed findings of fact and conclusions of law, as follows:

> That in said deed E. T. Barnette and Isabelle Barnette further authorize and empower said re-

ceiver to collect and receive the amount of $226,025 payable on the 18th day of November, 1914, in case of an option given on the 18th day of November, 1909, for the purchase of forty-nine per cent. of said property situate in the Republic of Mexico, is exercised by the optionees mentioned in said option by that time, and to apply such sum to the payment of said claims of depositors and creditors of said bank.

Assignment of Error No. 70.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVI of defendants' proposed findings of fact and conclusions of law, as follows:

That said deed to property in the Territory of Alaska also provides for and gives said receiver power to collect and receive all the rents, royalties and proceeds of the property therein described, and to sell said property and to apply the amount so received in payment of said claims of depositors and creditors of said bank at any time when it shall be deemed most advisable to do so by the said E. T. Barnette and Isabelle Barnette and the receiver; but that if said property is not so sold by the 18th day of November, 1914, that said receiver is then authorized to sell said property without the consent of said E. T. Barnette and Isabelle Barnette and to apply the amount so received in payment of the claims of the creditors and depositors of said Washington-Alaska Bank of Nevada.

Assignment of Error No. 71.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the said receiver holds a large amount of property belonging to said bank, which is of great value and has not been converted into money; and the property so held by him, and the property so conveyed to the receiver by the said E. T. Barnette and Isabelle Barnette, are more than sufficient to satisfy all the claims, demands and obligations of whatsoever nature now existing against said Washington-Alaska Bank of Nevada.

Assignment of Error No. 72.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the receiver has received as rents, royalties and profits from the property of the said E. T. Barnette and Isabelle Barnette situate in the Territory of Alaska, the sum of $31,400.00, and that said amount, together with the property conveyed by the said E. T. Barnette and Isabelle Barnette, exclusive of the property situate in said Republic of Mexico, are more than ample to pay all the matters and things charged against these defendants in said amended complaint of plaintiff herein; and that all the wrongs and things charged against these defendants in said amended complaint have, by reason thereof, been fully satisfied and paid.

Assignment of Error No. 73.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the then receivers of the said Washington-Alaska Bank agreed to accept in full satisfaction of all the matters and things set forth in plaintiff's amended complaint and sued on herein, the said promises and property of the said E. T. Barnette and Isabelle Barnette, and the said E. T. Barnette and Isabelle Barnette made and executed said promises and conveyed said property, in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the said Washington-Alaska Bank of Nevada, and in full satisfaction of all the matters and things set forth in plaintiff's amended complaint; and the said receivers accepted and received said promises and said property in full satisfaction of all claims and causes of actions set forth in the amended complaint of the plaintiff herein.

Assignment of Error No. 74.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph IV of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the stock that was surrendered, and taken back by the directors, and of which said directors had knowledge, was taken honestly and in good faith and under the belief of the said directors

that they had a right to take back said stock, and that the same was for the best interest of the corporation.

Assignment of Error No. 77.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph V of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the balance of the stock so surrendered, and taken back by the officers of said bank, was done without the knowledge, consent, approval or acquiescence of said directors, and there was nothing to charge the said directors with knowledge that its officers were violating the resolutions of the said board of directors not to take back or cancel any stock.

Assignment of Error No. 78.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph VI of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the declaration of the dividend by the directors was done by them honestly and in good faith and under the honest belief that the assets of said corporation exceeded its liabilities in the sum of $34,828.55, and that there was net profits to said amount and that said directors believed at said time that the assets were of the value that said corporation was carrying them.

Assignment of Error No. 79.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph VIII of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the directors of said bank had a right to rely upon the honesty and fidelity of their officers, and are not chargeable with any acts that said officers did in violation of the instructions of said board of directors.

Assignment of Error No. 80.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph X of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the plaintiff is not entitled to recover any judgment whatsoever against any of the defendants Jesson, Heill, Wood, Brumbaugh, McGinn, Peoples, Clark, Healey and Preston, or either of them.

Assignment of Error No. 82.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph XI of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the defendants are entitled to a decree that the plaintiff recover nothing by this action, and that defendants have judgment for their costs and disbursements.

Assignment of Error No. 83.

The Court erred in overruling the defendants' objections to finding of fact numbered XXIII so made and filed in this cause, and in making the same, which is as follows:

> That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of $27,997.38, which depended for their value upon the existence of an alleged guaranty of the Scandinavian American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said board of directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of $27,997.38.

Assignment of Error No. 93.

The Court erred in overruling the defendants' objections to that portion of paragraph LI of the findings of fact made and filed in said cause, and in making the same, which is as follows:

> That said bank had no surplus or undivided profits against which the same could be charged.

Assignment of Error No. 102.

The Court erred in overruling the defendants' objections to paragraph LII of the findings of fact so

made and filed in said cause, and in making the same, which is as follows:

> That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful and in violation of the laws of the State of Nevada under which said corporation was organized.

Assignment of Error No. 103.

The Court erred in overruling the defendants' objections to findings of fact numbered LIV so made and filed in this cause, and in making the same, which is as follows:

> That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.

Assignment of Error No. 104.

The Court erred in overruling the defendants' objections to finding of fact numbered LXI so made and filed in this cause, and in making the same, which is as follows:

> That at the time said dividend was so declared and paid, the Fairbanks Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid.

Assignment of Error No. 107.

The Court erred in overruling the defendants' objections to findings of fact numbered LXII so made

and filed in this cause, and in making the same, which is as follows:

> That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

Assignment of Error No. 108.

The Court erred in overruling the defendants' objections to findings of fact numbered LXVI so made and filed in this cause, and in making the same, which is as follows:

> That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities, and the amount of such liabilities is more than $470,000 in excess of the value of said assets.

Assignment of Error No. 109.

The Court erred in overruling the defendants' objections to conclusion of law numbered I of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Wood, McGinn, Brumbaugh and Jesson are jointly and severally liable in the sum of $33,720.00 by reason of the declaration and payment of the dividend upon the capital stock of the Fairbanks Banking Company on April 12, 1910.

Assignment of Error No. 110.

The Court erred in overruling the defendants' objections to conclusion of law numbered 2 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendant Jesson is liable in the sum of $13,400.00 by reason of the surrender of shares of capital stock of said company, made between July 13, 1908, and September 12, 1908.

Assignment of Error No. 111.

The Court erred in overruling the defendants' objections to conclusion of law numbered 3 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Jesson and Hill are jointly and severally liable in the sum of $1,500.00 for surrender of shares of capital stock of said company made between September 13, 1908, and October 13, 1908.

Assignment of Error No. 112.

The Court erred in overruling the defendants' objections to conclusion of law numbered 4 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Jesson, Hill and Peoples are jointly and severally liable in the sum of $1,100.00 for surrenders of shares of capital stock, made between October 14, 1908, and March 13, 1909.

Assignment of Error No. 113.

The Court erred in overruling the defendants' objections to conclusion of law numbered 5 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Jesson, Hill and Brumbaugh are jointly and severally liable in the sum of $1,000.00 for surrenders of capital stock of said company made between March 14, 1909, and September 12, 1909.

Assignment of Error No. 114.

The Court erred in overruling the defendants' objections to conclusion of law numbered 6 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That defendants Jesson, Brumbaugh and McGinn are jointly and severally liable in the sum of $3,000.00 for surrenders of capital stock of said company, made between September 13, 1909, and October 12, 1909.

Assignment of Error No. 115.

The Court erred in overruling the defendants' objections to conclusion of law numbered 7 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That defendants Jesson, McGinn and Brumbaugh are jointly and severally liable in the sum of $1,000.00 for surrenders of capital stock made between October 13, 1909, and January 18, 1910.

Assignment of Error No. 116.

The Court erred in making a conclusion of law as set forth in paragraph 8 of the conclusions of law signed and filed in this cause, which is as follows:

> That the plaintiff is entitled to a decree and judgment against the above-named defendants for the recovery of the sums above mentioned.

Assignment of Error No. 117.

The Court erred in making and entering judgment and decree in favor of the plaintiff and against the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally for the sum of $33,720.00 by reason of the declaration and payment on April 12, 1910, of the dividend upon the capital stock of the Fairbanks Banking Company, set up in the complaint.

Assignment of Error No. 118.

The Court erred in rendering and entering a judgment and decree in favor of the plaintiff and against the defendant J. A. Jesson for the sum of $13,400 by reason of the surrender of shares of the capital stock of said company made between July 13, 1908, and September 12, 1908.

Assignment of Error No. 119.

The Court erred in making and rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson and James W. Hill, jointly and severally, for the sum of

$1,500.00 by reason of the surrender of shares of the capital stock of said company made between September 13, 1908, and October 13, 1908.

Assignment of Error No. 120.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants James W. Hill and J. A. Jesson and E. R. Peoples, jointly and severally for the sum of $1,100.00 by reason of the surrender of shares of the capital stock of said company made between October 13, 1908, and March 13, 1909.

Assignment of Error No. 121.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, for the sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company made between March 14, 1909, and September 12, 1909.

Assignment of Error No. 122.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, for the sum of $3,000.00 by reason of the surrender of shares of capital stock of said company made between September 13, 1909, and October 12, 1909.

Assignment of Error No. 123.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants John A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, for the sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company, made between October 13, 1909, and January 18, 1910.

Assignment of Error No. 124.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh, and James W. Hill, to the effect that plaintiff recover the costs of and from said defendants.

Assignment of Error No. 125.

The Court erred in making, rendering and entering a decree to the effect that execution issue for the enforcement of the above judgments and decrees against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

Assignment of Error No. 126.

The Court erred in not making, rendering and entering a decree in favor of defendants and against the plaintiff to the effect that the plaintiff take nothing in this action, and that the defendants recover their costs and disbursements.

Assignment of Error No. 127.

The Court erred in refusing to make a finding that all the matters and things charged in the complaint were fully compromised and settled by the accord and satisfaction that was entered into between E. T. Barnette and Isabelle Barnette, and the former receivers of said corporation.

Assignment of Error No. 128.

The Court erred in finding that the defendants Wood, Brumbaugh, J. A. Jesson and McGinn, as directors, were liable for the declaration of the dividend of the 12th day of April, 1910.

Assignment of Error No. 129.

The Court erred in finding that these defendants were liable for the stock taken back by said corporation, as set forth in the findings of fact.

Assignment of Error No. 130.

The Court erred in failing to make a finding of fact to the effect that all the wrongs charged in the complaint have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 131.

The Court erred in failing to make a finding of fact to the effect that all the matters and things found against these defendants have been fully satisfied and paid by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 132.

ARGUMENT.

I.

THE COMPLAINT IS MULTIFARIOUS.

The complaint was attacked by motion to strike it from the files and by motion to strike out certain portions of the complaint. Assignments Nos. 1 and 2 (Tp. 54 *et seq.*).

A bill seeking to hold several directors of a bank liable for losses caused by unlawful loans and dividends extending over a series of years, during some of which a portion of the defendants were not members of the board of directors, and were in no way responsible for the losses, is multifarious.

The case of *Emerson* v. *Gaither,* 103 Md., 504, 8 L. R. A. (N. S.), 745, is on all fours with the case at bar. The Court said in that case:

> "There is, perhaps, more confusion, real or apparent, in the authorities on the subject of multifariousness than any other connected with equity procedure. This is in part owing to the fact that there is no rule on the subject of universal application, and much is left to the discretion of the court, to be determined by the facts of each particular case. The tendency of the courts has been to overrule the objection; but when a chancellor can see that a bill undertakes to burden one or more defendants with matter with which they are not connected, and not responsible, or that the bill is liable to create confusion by reason of the joinder of improper parties who have no privity with

each other, or because several distinct matters have been blended, which have no connection with each other, he is at least called upon to give it a most careful scrutiny. There is no occasion to go outside of this record to give illustrations of what we have in mind. The defendants named in this bill are sixteen persons who at some time had been directors of this bank, and the executors and the distributees of another person who had in his lifetime been a director. It states the times during which the different persons were directors, but as it is alleged that on January 1, 1898, the bank was solvent, and only complains of what was done after that time, it is not necessary to go back of that date. It charges that Messrs. Horner, Bauernschmidt, Hartman, Woolford, and McPhail were directors from January 1, 1898, to December 22, 1900; Mr. Brinton to May 3, 1898; Mr. Walpert to September 29, 1898; Messrs. Ellis and Dickey to November 20. 1898; Mr. Emerson to March 20, 1899; Mr. Malster to January 19, 1900; and that the following served to December 22, 1900, from the dates named, to wit: Mr. Thompson to August 5, 1898, Mr. Harden from October 14, 1898, Messrs. Abercrombie and Hertel from January 12, 1899, and Messrs. McDevitt and Marts from January 12, 1900. * * *"

"Messrs. Ellis and Dickey, who retired on November 29, 1898, could only have been connected with three transactions amounting of a little over $17,000. and Mr. Emerson with only four of the loans, amounting to something less than $22,000, and the one dividend of December 30, 1898; and it is impossible to tell from the bill that all of those loans were not repaid before the bank failed. Paragraph six names the directors that are charged with declaring the dividends unlawful, and neither Brinton, Walpert, Ellis, Dickey, McDevitt, nor

Marts is alleged to have taken any part in them, and they could not have done so, as they were not directors at either of the times named. Yet they are made defendants to a bill in which the declaration of dividends is made a separate and distinct charge, and it is easy to see what the investigation of that charge would involve. It necessarily means that the financial condition of the bank at those periods must be inquired into and determined, and that may involve tedious and expensive accountings of experts, and taking much testimony. So with the numerous loans charged to have been unlawfully made by the officers, by reason of the negligence of the directors in the discharge of their duties. Some of those items may require a large mass of testimony to be taken in order to ascertain the circumstances under which the loans were made, whether they were repaid, what directors knew or ought to have known of them, whether any of the directors of later dates were negligent in not requiring them to be paid, or not securing them, etc. Are all of the defendants to be thus subjected to inconvenience, loss of time, fees of counsel, and possibly expert accountants, court costs incurred concerning matters in which they are not connected, simply because at some time they happened to be directors of the same bank? It would be very difficult if not impossible, for the court to accurately apportion the costs. There is not a 'common liability' within the meaning of that expression as used in *Fiery* v. *Emmert,* 36 Md., 464, when one director of a corporation is liable for one act, and others are liable for twenty or more separate and distinct acts, although of the same general character. * * * And so as to Messrs. Emerson, Walpert, and others who are only alleged to have been connected with a few of the transactions complained of. It certainly cannot be allowed merely because it may re-

quire two or three more suits than would be necessary if all were joined in one. A multiplicity of suits, although to be avoided when it can reasonably be done, is far preferable to one suit which, by reason of the joinder of different matters, is likely to work injustice. * * * We are of the opinion that the demurrers should have been sustained."

Alaska has a special statute regulating joinder of causes of action of an equitable nature which reads as follows:

Sec. 1201. The plaintiff in an action of an *equitable* nature may unite several causes of action in the same complaint, where they all arise out of—

First. *The same transaction, or transactions connected with the same subject of action;*

Second. Contract, express or implied; or,

Third. Injuries, with or without force, to property;

Fourth. Claims to real property or any interest therein, with or without an account for the rents and profits thereof;

Fifth. Claims to personal property, or any interest therein, with or without an account for the use thereof;

Sixth. Claims against a trustee by virtue of a contract or by operation of law.

But the causes of action so united must all belong to one of these classes, and *must affect all the parties to the action,* and not require different places of trial, and *shall be separately stated.*

Compiled Laws Ty. of Alaska (1913), C. C. P.; *Carter Code,* Sec. 369.

The complaint in this action violates the statute in three particulars:

1. The causes of action do not all arise out of the same transaction, nor are they connected with the same subject of action.

They embrace transactions occurring at various times over a period of three years. The transactions complained of were of various kinds: the purchase of the original assets, overvaluation, improper credit of interest, illegal purchase of stock.

2. They do not affect all the parties to the action.

3. They are not separately stated.

The proper method of attack is by motion to strike out the pleading:

> Sec. 905. * * * A motion to strike out a pleading for want of verification or subscription, or *because several causes of action or defense therein are not pleaded separately,* or for other cause, or a sham, frivolous, or irrelevant pleading or redundant matter therein, shall be made within the time for answering such pleading.
>
> *Compiled Laws Ty. of Alaska* (1913), Code of Civ. Proc.

This course was adopted in this case (p. 54).

The peculiar disadvantage of this *omnium gatherum* method of pleading, in the case at bar, will be apparent when we come to consider the following:

The defendant McGinn was a member of the Board of Directors from the 14th day of September, 1909, until about the first of May, 1910. During this time he is charged with certain acts of wrongdoing which the Court found consisted of acquiescing in the surrender of stock and the declaration of a dividend. Yet McGinn as attorney for the bank is charged with wrongfully and unlawfully taking over the Gold Bar Lumber Company stock at a grossly fraudulent over-valuation; with taking over loans and discounts that had no value; with permitting the copartners to be credited with accrued interest to the amount of over $39,000.00; with allowing Wood to dispose of his stock for $13,000.00, and other acts for all of which, if wrong, only the directors could be held responsible for. No conspiracy is charged between McGinn and the Board of Directors. The allegation of the complaint as to all acts charged against the defendants (except when McGinn was a director) is to the effect that "all was done and accomplished with the full "knowledge, co-operation and consent of all of the "defendants" (naming the Board of Directors and other officers) "and of the defendant John L. Mc-"Ginn, who was then and there attorney and legal "adviser both of said copartnership and said cor-"poration Fairbank Banking Company and who after-"wards became a director and vice-president of said "corporation" (p. 9).

Suppose all this were true and that McGinn had

full knowledge of the alleged fraudulent acts, in his capacity as legal adviser of the Bank, could he be held responsible? Under the Nevada laws under which the plaintiff is seeking to charge the defendants, only the trustees or directors under whose administration the wrong was done could be held responsible. Under that law all the directors "except those who may cause "their dissent to be entered at large on the minutes "shall in their individual and private capacities be "jointly and severally liable to the corporation" (pp. 391-2).

Suppose McGinn as legal adviser to the Board of Directors had opposed their action. Had he any right to cause his "dissent thereto to be entered at large on the minutes"? Is a legal adviser to be held as responsible as a director for acts over which he has no control and has no vote in? Likewise are Wood as cashier and Hill as vice-president, neither being member of the directory, also to be held liable?

We have made this illustration to bring prominently before the Court the injustice of permitting a multifarious complaint. The defendants under Section 96 of Alaska Code moved to strike the amended complaint "from the files of the case" for the reason that more than one cause of action has been attempted to be pleaded in said amended complaint without stating each cause of action separately as prescribed by Section 96 of Part IV, Carter's Annotated Code of Alaska, and also to strike "out from this case the

" amended complaint herein upon the ground that " said amended complaint contains a large number of " alleged causes of actions, and in no case does any one " of the alleged causes of action affect all the parties " defendant, and said several causes of action are not " stated or pleaded separately, and do not belong to " the same class" (pp. 54, 55, 56, 57).

Federal cases may be cited to the effect that such a pleading is permissible. These cases are under the general equity practice not governed by any statutory law. But the Laws of Alaska, Section 1201 (*supra*) provide that in equity cases various causes of action may be set forth in one complaint, but the separate causes of action must be separately stated.

Section 1201 above quoted is a positive law of Congress as to how separate causes of action in equity cases may be pleaded in Alaska. Evidently Congress had in mind at the time of its passage the injustice under the prevailing Federal practice of such pleading as the one illustrated in *Emerson on Gaither* (*supra*), where all of the defendants are subjected to inconveniences, loss of time, fees of counsel and possibly expert accounting and court cost concerning matters with which they are not connected, simply because at some time they happened to be directors of the same Bank.

To bring the matter pointedly before the Court we will again show the position of the defendant McGinn. The Court held him liable on two charges of the complaint (1) that "the taking back of said stock and the

" payment therefor as aforesaid was illegal, wrongful " and in violation of the laws of the State of Nevada " under which said corporation was organized" (Finding 52, page 209); and (2) "that said dividend was " declared and paid in violation of the laws of the " State of Nevada and also in violation of the by-laws " of said Fairbanks Banking Company, and was " wrongful and illegal" (p. 214).

Under the general law a corporation has a right to purchase its own stock. The cases in support of this proposition will be hereinafter cited. If this cause of action as to McGinn and the other defendants had been separately pleaded, they could have demurred to the same on the grounds that said separate cause of action did not state facts sufficient to constitute a cause of action and the Court must have sustained the same. If it had been intimated in the complaint that it was not under the general law but under a special statutory law of the State of Nevada that it was sought to charge the defendants, then a motion would have been made to require the plaintiff to set forth such a law. The same is true as to the dividend. The complaint, however, as to the dividend charges a common law liability, but the finding of the Court is simply "That " said dividend was declared and paid in violation of " the laws of the State of Nevada. * * *" (p. 214).

Had the motion of the defendants to strike out the complaint been granted, the plaintiff would have had to set out each cause of action separately. It then

would have been apparent that McGinn was joined as a defendant in respect to several causes of action with which he had nothing to do. He could have forced either a dismissal of himself from the case or a dismissal of these causes from this action, and in either event would have escaped the burden and expense of a long trial involving many transactions to which he was legally a stranger.

The same applies to all the other defendants except Jesson, who was a director through the entire period covered.

II.

THE COMPLAINT IS DEFECTIVE, FOR THE REASON THAT IT FAILED TO PLEAD THE LAW OF NEVADA, WHICH IT WAS NECESSARY TO PROVE IN ORDER TO WARRANT A RECOVERY AGAINST THE DEFENDANTS ON ACCOUNT OF ANYTHING THEY DID IN REFERENCE TO THE DIVIDEND OR PURCHASE OF THE STOCK.

The Court rendered judgment in favor of the plaintiff on two propositions—the purchase of the stock, and the declaration of the dividend. It was claimed that both of these were in violation of the law of the State of Nevada, under which the plaintiff's bank was incorporated.

It was an essential element of plaintiff's case to establish the Nevada law. He sought to do this by offering in evidence certain fragments of the Ne-

vada Statute (p. 391). But nowhere did he plead it and *nowhere did the Court find it as a fact.*

The only findings on this subject were:

> That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized (p. 209). Assignment No. 103.

> That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the By-Laws of the said Fairbanks Banking Company, and was wrongful and illegal (p. 214). Assignment No. 108.

These findings are of course insufficient, being mere conclusions of law. It was necessary to find what the law of Nevada was, and as a predicate for such a finding, it was necessary to allege the matter in the complaint.

In order to hold these defendants under the circumstances of this case, it was incumbent upon the receiver to show *what statute* of Nevada they were violating when they did the acts complained of, for if there were no statute bearing upon the subject, then the presumption would arise in favor of the regularity of their action. It would moreover be necessary to show that they were animated by motives of fraud. The general doctrine in vogue throughout the United States would be applicable, that in the absence of statutory prohibition, a corporation has the right to

purchase its own stock, even though the effect thereof is thereby to diminish its capital.

The appellants attack this phase of the complaint in various ways. They demur to the complaint as a whole for failure to state facts sufficient to constitute a cause of action; they move to strike out separate portions of the complaint; they move to require causes of action to be separately stated. Assignments Nos. 1, 2 and 3).

The rule that the courts of one country cannot take cognizance of the law of another without *plea and proof* has been constantly maintained at law and in equity, in England and America.

Liverpool and Great Western Steam Co. v. *Phenix Ins. Co.,* 129 U. S., 793;
Church v. *Hubbart,* 6 U. S., 2 Cranch., 187, 236 (2: 249);
Ennis v. *Smith,* 55 U. S., 14 How., 400, 426, 427 (14: 472);
Dainese v. *Hale,* 91 U. S., 13, 20, 21 (23: 190, 193);
Pierce v. *Indseth,* 106 U. S., 546 (27: 254);
Ex parte Gridland, 3 Ves. & B., 94, 99;
Lloyd v. *Guibert,* L. R., 1 Q. B., 115, 129; S. C., 6, Best & S., 100, 142;
Wickersham v. *Johnston,* 104 Cal., 407.

Where a party seeks either to recover or defend under a foreign law, such law must be pleaded and

proved like any other fact, since the Court cannot, ex-officio, take notice of the laws of a foreign State. *Encyc. Pleading and Practice,* Vol. 9, p. 542.

Norris v. *Harris,* 15 Cal., 254.

In *Monroe* v. *Douglass,* 5 N. Y., 451, the Court said:

> "Although the respondent, in his answer, has made frequent reference to the laws of Scotland, and alleged that by them he acquired a right to the real estate in question, yet neither he nor the appellants have *set forth or claimed in their pleadings,* or proved, that the laws of Scotland are different from our own, in regard to the construction and legal effect of the testamentary settlement; nor have they *averred* or proved the existence, in that country, of any rule or principle of law, written or unwritten, relating to that subject, which, on comparison, appears different from our own. It is a well-settled rule, founded on reason and authority, that the *lex fori,* or, in other words, the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie,* the rule of decision; and if either party wishes the benefit of a different rule or law, as, for instance, the *lex domicilii, lex contractus,* or *lex loci rei sitae, he must aver and prove it.* The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be *averred and proved,* like other facts of which courts do not take judicial notice; and the mode of proving them, whether they be written or unwritten, has been long established."

In *Holmes* v. *Broughton,* 10 Wend (N. Y.), 75, 25 Am. Dic., 536, it was held that a plea of former recovery in another State, and satisfaction of the judgment by a proceeding unknown to the common law, but alleged to be authorized by the statute of such State, should set out the statute, that the Court may see how such proceedings constitute a bar to the plaintiff's action.

The Court said:

> "The question is, whether the proceedings alleged to have been had in the State of Vermont are well pleaded? It is laid down by Mr. Chitty that the courts do not *ex officio* take notice of foreign laws, and *consequently they must in general be stated in pleading*: 1 Chit., Pl. 221. The question arose in *Collett* v. *Keith,* 2 East, 261, which was an action of trespass for seizing and taking a ship at the Cape of Good Hope, to wit, etc. The defendant, among other things, pleaded, that the settlement of the Cape of Good Hope was subject to foreign, to wit, Dutch laws; that the ship was within the jurisdiction of the supreme court there, and that certain proceedings were instituted and had; that the defendant, according to the foreign laws of the place, the said court having competent jurisdiction, was authorized and ordered to take and detain the ship. To this plea there was a demurrer. In deciding the case, Grose, J., said, that the plea was too general; that it was not enough to state that the vessel was within the jurisdiction of the court which was governed by foreign laws, and that certain proceedings were instituted; but the defendant should have shown what the foreign law was which gave jurisdiction to the court.

"In the case of *Walker* v. *Maxwell,* 1 Mass., 103, it was held that a defendant who relies upon the statute of another state, must, *in his plea,* set out the statute, that the court may see whether the proceedings were warranted by the statute or not, and the general allegation that the proceedings were pursuant to the statute is not sufficient. That was an action on a promissory note, so called in the declaration, by which Lyon and Maxwell promised the plaintiffs, by the name of James Chase & Co. to pay them thirty-five dozen wool cards on a certain day. Maxwell defended and pleaded that an action was brought by one Cole, in the common pleas of Bristol county, in the state of Rhode Island, against Chase, one of the plaintiffs in this action, upon a certain note which is set forth, of which Cole was indorsee, and that Cole, pursuant to the statute of the state of Rhode Island in such case made and provided, directed the sheriff to serve the original writ upon the defendants, Lyon and Maxwell, for the purpose of attaching the personal estate of Chase in their hands; that in pursuance of the statute aforesaid, service was so made; that Lyon and Maxwell pursuant to the statute aforesaid, appeared and submitted to examination, etc.; that judgment was rendered in favor of Cole against Chase, as appears by the record; and further, that Cole prosecuted an action in the said court, in pursuance of the statute aforesaid, against the defendants, Lyon and Maxwell, upon the note now declared on, and set forth proceedings against Chase, and judgment; whereby Lyon and Maxwell became liable to pay the value of the wool cards attached as aforesaid, etc., stating a judgment in favor of Cole against Lyon and Maxwell for the amount, etc. To this plea the plaintiff demurred, and assigned several causes of demurrer, one of which is, that it does not appear by the plea what the said statute or law is, which is mentioned as a

statute in said plea, nor by what law or authority the court of common pleas in Bristol county in Rhode Island, gave the judgment described in the plea. The whole court were of opinion that the plea was bad for the cause assigned; they said that *the plea should have set set forth the statute of Rhode Island,* that the court might see whether the proceedings stated in the plea were authorized. That the common law might be considered common to both states, and regulating the proceeding of courts of justice in both; but the proceedings stated in the plea being of a peculiar kind, and so different from the common law, the statute ought to be shown to them, and the general allegation, that the proceedings were pursuant to the statute of Rhode Island, was not sufficient.

"The case of *Pearsall* v. *Dwight,* 2 Mass., 84 (3 Am. Dec., 35), shows what is considered sufficient in that state. There the defendant pleaded the statute of limitations of the state of New York; the part of the statute upon which he relied was pleaded wih a profert of the exemplification of the whole statute, with necessary averments, and it was held by Parsons, C. J., that, nothwithstanding the profert of the exemplification of the statute, *the court could not take notice of any part of the statute not shown in the plea;* that if the opposite party relied on any part of the same statute, he should have prayed over and spread the whole statute upon the record. Again, in the case of *Legg* v. *Legg,* 8 Mass., 99, the same court declare that they could not judicially take notice of the laws of Vermont, and that upon the point there stated. which was a common law question, they must presume the laws of Vermont to be similar to their own. The doctrine of this highly respectable court seems to me to be sound, and if so, the plea in this case is defective in not setting forth the statute of Vermont, if any, authorizing the proceedings stated

to have taken place, that the court may see how those proceedings constitute a bar to the plaintiff's action. This court cannot take judicial cognizance of any of the laws of our sister states at variance with the common law. The proceedings stated are not common law proceedings, and the authority for them must be specially set forth."

Thomas v. *Pendleton,* 1 S. Dak., 150, 36 Am. St. Rep. 727, was an action founded upon an alleged judgment in the court of common pleas of Crawford county, in the State of Pennsylvania.

The complaint set out the note and warrant of attorney upon which the alleged judgment was founded. In the complaint the judgment was alleged to have been rendered on the eighth day of May, 1889, upon a note bearing date March 12, 1889, payable ninety days after its date. It therefore appeared upon the face of the complaint that the alleged judgment was rendered more than thirty days before the note, by its terms, became due and payable. The court said:

"No law of the state of Pennsylvania *is set out or pleaded* authorizing a judgment to be entered upon a note before its maturity. In the absence of any allegation as to what the laws of Pennsylvania are on this subject, the court will presume they are the same as our own."

In *Meuer* v. *Chicago, Etc. Ry Co.*, 5 S Dak., 568, 49 A. S. R., 900, the Court said:

> "The contract in this case, having been made in Wisconsin, may be regarded as a contract of that state, and to be interpreted in accordance with the laws of state: *Liverpool, etc., Co.* v. *Phenix Ins. Co.*, 129 U. S., 397; *Hazel* v. *Chicago, etc. Railroad Co.*, 82 Iowa, 477. This court, however, will not take judicial notice of the laws of another state. Such laws must be *alleged* and proven on the trial, the same as any other facts in the case. No such evidence appears from the record in the case to have been given. In the absence of such evidence, this court will presume that the law of Wisconsin as to the right of a common carrier to limit the liability of himself or servants is the same as the law of this state upon that subject."

III.

THE PURCHASE OF ITS STOCK BY THE CORPORATION WAS NOT IN VIOLATION OF THE GENERAL LAW.

Quoting from the opinion of the Court (p. 1216):

> "The plaintiff's complaint alleges that soon after the corporation began doing business, it commenced to diminish its capital stock by surrendering a certain part thereof to its stockholders, and cancelling certain stock subscriptions and certain shares of stock that had been issued. The evidence showed that, beginning June 30, 1908, with the payment to Wood of $13,000.00 for 130 shares of stock agreed to be issued to him, and ending October 25, 1910, when 100 shares of stock were purchased from John L. McGinn for $6,000.00, shares of stock amounting to $56,000.00 were taken over by

the bank. * * * The defendants contend that the corporation had a right to purchase its own stock. * * *

"The defendants cite numerous authorities to sustain their contentions, and I am satisfied that the weight of authority in the United States is that a corporation, where not prohibited by statute or its charter, may purchase shares of its own stock."

There is abundance of authority in support of this much of the opinion of the Court.

The rule is thus stated in 7 Ruling Case Law, 528:

"According to the prevailing rule in this country, in the absence of any restrictions imposed by its charter or the general laws, a corporation has power, where the interests of its *existing* creditors are not adversely affected, to purchase its own capital stock."

The rule is thus laid down in 7 A. & E. Encyc. Law, p. 818:

"There is nothing in the nature of a corporation that renders it absolutely incapable of holding or dealing in its own stock. And in most states in which the question has arisen it has been held that corporations may purchase, hold and sell shares of their own stock, provided there is no charter or statutory prohibition in the way, and provided, further, that they act in good faith and without intent to injure or injury to creditors. This seems now to be the prevailing doctrine."

And there are innumerable authorities in support of this position.

Clapp v. *Peterson,* 104 Ill., 26;
City Bank of Columbus v. *Bruce,* 17 N. Y., 507;
State v. *Smith,* 48 Vt., 266;
Williams v. *Savage Mfg. Co.,* 3 Md. Ch., 418;
Taylor v. *Miami Exp. Co.,* 6 Ohio, 177;
Crandall v. *Lincoln,* 52 Conn., 73, 52 Am. Rep., 560;
Chicago, etc., R. R. Co. v. *Marseilles,* 84 Ill., 145;
Dupee v. *Boston Water Power Co.,* 114 Mass., 37;
St. Louis Rawhide Co. v. *Hill,* 72 Mo. App., 142;
Morgan v. *Lewis,* 46 Ohio St., 1, 17 N. E., 558;
Yeaton v. *Eagle Oil, etc., Co.,* 4 Wash., 183, 29 Pac., 1051;
Chapman v. *Ironclad, etc., Co.,* 62 N. J. L., 497, 41 Atl., 690;
Blalock v. *Kernersville Mfg. Co.,* 110 N. C., 99, 14 S. E., 501;
Howe Grain, Etc. Co. vs. *Jones,* 21 Tex. Civ. App., 198, 51 S. W., 24;
Chalteaux v. *Mueller,* 102 Wis., 525, 78 N. W., 1082;

Rollins v. *Shaver Wagon etc. Co.,* 80 Iowa, 380, 20 Am. St. Rep., 427, 45 N. W., 1037;

Oliver v. *Rahway Ice Co.,* 64 N. J. Eq., 596, 54 Atl., 460;

Nat. Bank of Peoria v. *Peoria Watch Co.,* 191 Ill., 128, 60 N. E., 859;

West v. *Averill Grocery Co.,* 109 Iowa, 488, 80 N. W., 555;

Dock v. *Schlichter Jute Co.,* 167 Pa. St., 370, 31 Atl., 656;

Marvin v. *Anderson,* 111 Wis., 387, 87 N. W., 226;

1 *Cook on Corporations,* sec. 311;

Porter v. *Plymouth Gold Mining Co.,* 101 Am. St. Rep., 573, 574;

Com'rs of Johnson County v. *Thayer,* 94 U. S., 631, 24 U. S. (L. ed.), 133;

Fitzpatrick v. *McGregor,* 133 Ga., 332, 65 S. E. 859; 25 L. R. A. (N. S.), 50;

Republic Life Ins. Co. v. *Swigert,* 135 Ill., 150; 25 N. E., 680, 12 L. R. A., 328;

Iowa Lumber Co. v. *Foster,* 49 Ia., 25, 31 Am. Rep., 140;

Wisconsin Lumber Co. v. *Greene, etc., Telephone Co.,* 127 Ia., 350, 101 N. W., 742, 109 A. S. R., 387, 69 L. R. A., 968;

New England Trust Co. v. *Abbott,* 162 Mass., 148, 38 N. E., 432, 27 L. R. A., 271;

Knickerbocker Importation Co. v. *State Board of Assessors,* 74 N. J. L., 583, 65 Atl., 913; 9 L. R. A., (N. S.), 885;
Pabst v. *Goodrich,* 133 Wis., 43, 113 N. W., 398, 14 Ann. Cas., 824;
Gilchrist v. *Highfield,* 140 Wis., 476, 123 N. W., 102, 17 Ann. Cas., 1257, and note;
Atlanta etc. Ass'n. v. *Smith,* 141 Wis., 377, 123 N. W., 106, 135 A. S. R., 42, 32 L. R. A., (N. S.), 137;
First Nat'l. Bank v. *Salem,* 39 Fed., 89;
Lowe v. *Pioneer Threshing Co.,* 70 Fed., 646;
Copper Bull Mg. Co. v. *Costello,* 95 Pac., 94;
Antonio v. *Sanger,* 151 S. W., 1104.

IV.

THE PURCHASE OF THE STOCK WAS NOT IN VIOLATION OF THE LAW OF NEVADA.

Quoting again from the opinion of the Court:

"Plaintiff contends that this (the purchase of its own stock by the bank) was in direct violation of the laws of Nevada, under which the corporation held its charter, and that under those laws the directors, at the time any stock was surrendered, are jointly and severally liable for the amount thereof; while the defendants contend that the corporation had a right to purchase its own stock, and that all of the stock thus taken over was retained as treasury stock, and subject to reissue, that some of it was actually resold, and that in no event can the pur-

chase of its own stock by a corporation be held to operate as a reduction of its capital stock, unless there is an express intention to retire such stock and not to reissue it. * * * I am satisfied that the weight of authority in the United States is that whether or not such purchase operates as a reduction of the capital stock, depends upon the intention with which it is purchased, and that if it is the intention to reissue the purchased stock, the capital of the corporation is not necessarily reduced by reason of the stock being held for a time as treasury stock. I am not satisfied, however, that this meets all the prohibitions contained in the statutes of Nevada. The Act not merely prohibits the directors from reducing the capital stock unless in the manner prescribed by law, or in accordance with the provisions of the certificate or articles of incorporation, but it makes it unlawful for them 'To divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company.' The law provides that this section shall not prevent the retirement or conversion of either stock or bonds, or the distribution of the earnings or accumulations of the corporation as provided for in the articles or certificate of incorporation, original or amended; but I find nothing in the articles of incorporation of this company which provides for such retirement or conversion, nor do I think the provisions of the articles giving the corporation authority to purchase stock and bonds can be held, as contended by defendants, to authorize it to purchase shares of its own stock and pay for them out of its capital (pp. 1216-1219).

"The most, therefore, that can be said of the authority of the directors to purchase stock of the corporation is, that while the directors had such right under the charter and the laws of Nevada, they could exercise such right only when the pur-

chase price was paid from net profits or surplus funds of the corporation, and not where any part of its capital stock was used for such purpose. There might be special circumstances where, apparently, this would result, and still the directors would not be liable for any damages, if in view of all the circumstances such a purchase was evidently for the best interests of the corporation. Even where corporations have been absolutely prohibited by statute from purchasing their own stock, it has been considered lawful for them to take their stock in payment of a debt past due, or where it seemed necessary in order to prevent loss to the corporation. Some of the transactions complained of in the complaint seem fairly to come within this rule."

It was the theory of the plaintiff that under the law of Nevada (Section 68 of the Corporation Act) he was entitled to recover from the defendants the value of any stock purchased, without regard to the question whether the defendants knew that the stock was being purchased by the bank, or were negligent, or were guilty of any fraud. The portion of Section 68 in point, reads as follows:

"It shall not be lawful for the trustees or directors * * * to divide, withdraw or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock, unless in the manner prescribed in this Act, or in accordance with the provisions of the certificate or articles of incorporation. And in case of any violation of the provisions of this section, the directors or trustees under whose administration the same may have happened

* * * shall in their individual and private capacity be jointly and severally liable to the corporation, and to the creditors thereof to the full amount so divided, withdrawn or reduced or paid out."

The finding of the court, No. LII, was:

"That the taking back of said stock and the payment therefor as aforesaid, was illegal, wrongful and in violation of the laws of the State of Nevada, under which said corporation was organized."

Assignment of Error No. 103.

We have already remarked that this finding is not a finding of any fact, but rather a conclusion of law from facts which are not pleaded or found.

From the portion of the Nevada Corporation Law which was offered in evidence, it is apparent that the Nevada Law does not forbid the reduction of the capital stock, but provides a method by which it may be done. There is nothing in the record to show that the method is any different under the Nevada Statute from the procedure followed in this case. Furthermore, the Nevada Statute provides that the articles of incorporation may provide a method for the reduction of the capital stock. *Therefore, if a reduction of the capital stock is effected by the corporation's purchase of its own shares, it may follow that the articles of incorporation of this cor-*

poration have provided a method, which has in fact been followed.

In this connection we refer to the XLI finding (page 204), as follows:

> "That the Articles of Incorporation of said corporation authorized and empowered said corporation among other things, to buy and sell gold and silver bullion, foreign coin, *stocks,* bonds, and all other property, real and personal, and to do any business and exercise any powers incident to the banking business, or necessary or proper to the furtherance and attainment of the purposes of said bank."

Thus the articles of incorporation expressly authorized the company to purchase stock, and this includes its own stock.

We shall, however, contend that there was no reduction of the capital stock effected by the purchase of the shares in question.

V.

WHEN A CORPORATION BUYS SHARES OF ITS OWN CAPITAL STOCK, ITS CAPITAL STOCK IS NOT REDUCED BY THAT AMOUNT, NOR IS THE STOCK MERGED.

The rule is well stated in Cook on Corporations, Sec. 314, by the following language:

> "When a corporation buys shares of its own capital stock, the capital stock is not reduced by that amount, nor is the stock merged. So long, however, as the corporation retains the ownership,

the stock is lifeless, without rights or powers. It cannot be voted nor can it draw dividends, even though it is held in the name of a trustee for the benefit of the corporation. But at any time the corporation may resuscitate it by selling it and transferring it to the purchaser. Such sale may be made upon the authority of the corporate directors. It may be sold at its market value, and need not be held for its par value, as is necessary in an original issue of stock."

Ruling Case Law thus states it:

"The rule is well settled that where stock is acquired by a corporation, either by purchase, surrender, or forfeiture, it is not thereby extinguished, unless it is acquired by the corporation with that intention, but may be reissued. It remains dormant until it is reissued, and the voting power thereon is suspended whether it is held by the corporation or by a trustee for it" (7 R. C. L., Sec. 534, p. 552).

In *American Railway Frog Co.* v. *Haven,* 101 Mass., 398, 3 Am. Rep., 379, the Court said:

"The case finds that the capital stock was divided into 2,000 shares, all of which were properly issued to the original stockholders; and that sometime afterward 400 of these shares were transferred by some of the stockholders to Aaron N. Clark 'to hold for the benefit of the corporation.' If these transfers had been made directly to the corporation, without the intervention of a trustee, it would hardly be contended that it would thereby become entitled to vote at a meeting of stockholders. A corporation cannot literally be one of its own stockholders in the full sense of that term. Such a

transfer might not operate as a mere surrender or cancellation of stock, unless so intended. *It would not diminish the amount of the capital, nor necessarily reduce the number of shares.* The corporation might perhaps receive such a transfer, and hold the stock so conveyed to it, for the purpose of re-issue to new subscribers or purchasers. * * * The position of these shares, in our judgment, is the same, to all intents and purposes, so far as the right of voting upon them is concerned, as if they were held directly by the corporation itself; and, until they are sold and transferred by its authority, the right of voting upon them is suspended."

Ralston v. *Bank of California,* 112 Cal., 208, was a case where the bank was sued for conversion of certain shares of its own capital. The Court said:

"The argument that the corporation becomes the owner of the shares converted, and hence that its stock is reduced otherwise than in the manner provided by law (Civ. Code, sec. 359) and hence further that such conversion is legally impossible because contravening the policy of the law, has no great force. If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal (*Ex parte Holmes,* 5 Cow., 426). With the same purpose in view the bank, apparently in good faith and under claim of right, refused the registry, and this had the undesigned effect of converting the shares; and it is not perceived how acquisition of title by this means can, though wrongful as regards the plaintiff's, be more obnoxious to public policy than by contract in the

case supposed. The authorized capital is not reduced, for the shares are not extinguished, but may be reissued."

So, also, in the case of *Knickerbocker* v. *State Board,* 74 N. J. Law, 583, 9 L. R. A. N. S., 885, it was held that shares of stock once issued remain outstanding until retired in the legal manner, and, therefore, when a corporation bought its stock, it was not retired or merged.

And in the case of *Pabst* v. *Goodrich,* 133 Wis., 43, 113 N. W., 398, it was held that a solvent corporation has a right to purchase and hold its stock, and that such purchase does not amount to a cancellation of such stock. The Court said:

"A corporation clearly has the right to purchase its stock, keep it alive, and treat it as assets."

In *Porter* v. *Plymouth Gold Mining Co.,* 101 Am. St. Rep. 569, 575, the Court says:

"Would the capital stock of the company have been reduced in violation of Section 438 of the Civil Code by the purchase of the stock? Section 438 of the Civil Code provides as follows: 'Directors of corporations must not * * * reduce or increase the capital stock except as hereinafter specially provided.' The mere repurchase of this stock would not tend to decrease the capital stock of the company unless the directors should absolutely merge or extinguish the stock after its repurchase. The company could only deal with it just the same as it had done before the sale. It could be sold and issued again. The company

would be in no different position as to this stock than it would have been had the transaction with appellant with regard to it never occurred. When it is transferred to the company, it becomes a part of the property. It is there for the creditors and stockholders. The capital stock is not decreased. A portion of the capital of the company may be unavailable until the stock is again sold, but nothing is destroyed. Whether the stock is merged or extinguished or held as an asset for sale, is much a matter of intention on the part of the corporation. *If it is unlawful to decrease the capital stock, presumptively the directors did not violate the law, and it would require some positive showing to the contrary to overcome this presumption.*"

The following authorities lend sufficient support to this position:

Taylor v. *Miami,* 6 Ohio, 177;
City Bank of Columbia v. *Bruce,* 17 N. Y., 507;
Williams v. *Savage,* 3 Md. Chan., 418;
Ex parte Holmes, 5 Cow., 426;
State v. *Smith,* 48 Vermont, 266;
Morgan v. *Lewis,* 17 N. E., 558;
Fremont v. *Thompson,* 91 N. W., 376, 378;
4 *Thompson on Corporations,* 4078;
2 *Clark & Marshall on Corporations,* sec. 411-411(d);
Republic Life Ins. Co. v. *Swaggert,* 12 L. R. A., 328.

The by-laws of the corporation provided as follows:

> "All issued and outstanding stock of the company that may be donated to or purchased by the company or which shall revert to the company by reason of failure to pay for the same, shall be Treasury stock, and shall be held subject to disposal by the action of the board of directors. Said stock shall neither vote nor participate in dividends while held by the company.
>
> "The board of directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same, provided said board of directors shall offer to pay to said stockholder the same amount, as he might obtain from other persons" (p. 798).

This stock that was surrendered to the corporation was credited, as the evidence shows, to treasury stock, and was thereafter carried as an asset of the corporation (pp. 354 *et seq*).

No evidence was introduced to show that the directors disposed of this stock other than as provided in the by-laws.

If it had been the intention of the directors to reduce or retire this surrendered stock, they would not have carried it as treasury stock, and would not have carried the capital stock of the corporation at 300 shares, the amount provided for in the articles of incorporation. Furthermore, the Court must presume that the directors did not violate the law, and

some positive evidence must be given to the contrary to overcome this presumption. The only evidence upon this point is the evidence of James W. Hill to the effect that it was not the intention of the directors to reduce the capital stock, or to retire the surrendered stock, but that, on the contrary, it was their intention to re-issue the same. He testified:

"Q. Do you remember whether or not prior to the adoption of the by-laws, the question of the corporation buying the stock of any of its members was discussed?

"A. At which meeting?

"Q. Prior to the stockholders' meeting of March 12, 1908, when the by-laws were adopted?

"A. Yes. The matter had been discussed.

"Q. What was the sense of the stockholders upon that matter?

"A. That it would be advisable to have the bank have the first option to buy back its own stock.

"Q. For what reason?

"A. So that they could control the stock, or so that it couldn't fall into other hands and be used for purposes detrimental to the bank's interests; in other words, we didn't want any of the other banks to get hold of any of that stock.

"Q. Do you know whether any advice was taken at that time as to whether the corporation had the power to buy in stock?

"A. The whole transaction was handled under the advice of the firm of McGinn & Sullivan, who were then attorneys for the bank (Tp., 798).

"Q. What was the intention of the board of directors in regard to the stock that was surrendered

and turned into the treasury as to retiring it for good, or reissuing it?

"A. The intention was at all times to reissue it to other purchasers" (Tp., 799).

The evidence further discloses that some of this surrendered stock was afterwards issued to others. (Tp. p. 826.)

VI.

THE PURCHASE OF THE STOCK WAS WITHOUT THE KNOWLEDGE AND AGAINST THE INSTRUCTIONS OF THE DIRECTORS.

The portion of the opinion of the Court dealing with this subject reads as follows:

> "With the exception of these [the Strandberg and McGinn] transactions, it seems that the purchase of the other shares of stock, as charged by the complaint, were made, if not with the direct personal knowledge of the directors, at any rate under such circumstances that knowledge thereof was brought home to them, and they must be held to have ratified the same; also that they were made at times when the corporation had not surplus earnings or profits on hand, but were, in fact, made from the capital stock. That the directors at one time, at all events, had knowledge of such proceedings, is evident from the minutes of their meetings, where, on July 13, 1908, they passed the following resolution:
>
> "'The president submitted a written report in detail, showing the condition of the affairs of the bank as of July 11, 1908. The report was examined in detail, and on motion duly made and

seconded, it was ordered filed. Under questions of this report, question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock be paid for same and stock returned to the treasury of the bank.'

"While undoubtedly the directors at that time in good faith believed that they had a right to do this, it should not exempt them from liability for the results, if their action was in fact contrary to the provisions of the statute; and the directors in office at that time should be liable for stock surrendered, although they may not have had knowledge of each particular transaction, until some different course of proceeding was adopted by the board; and also directors in office, when subsequent surrenders were made, under similar conditions, should be liable for the same" (pp. 1227-1229).

The findings in this connection are as follows:

"That there was submitted to said board of directors at its meeting on July 13, 1908, a written report in detail showing the condition of the affairs of said bank, which said report was examined in detail and was ordered filed, and, under the question of this report, the question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock, be paid for the same, and the stock returned to the treasury of said bank" (p. 201).

"That after said bank took said stock of said Wood into its treasury, frequent and continuous surrenders of its stock were made to its stockholders, amounting in all to thirty-eight different

and distinct transactions, aggregating a total of $43,000 exclusive of said Wood's stock. That the stock so taken back by the corporation was charged to the treasury stock account, and of the same only ten shares of the par value of $1,000 were ever reissued. That said stock surrenders continued down to and including October 25, 1910, when the last surrender was made, being the McGinn stock of the par value of $10,000, for which the sum of $6,000 in cash was paid by the bank to said McGinn" (p. 206).

As a matter of fact the defendants had no actual knowledge of these surrenders of stock. (See pages 857, 858, 924, 926 and 1020.) The point is covered by Assignments of Error, Nos. 15 to 26.

On September 14, 1908, the following resolution was adopted by the executive committee, which was approved by the board of directors on October 14, 1908:

"The matter of the bank taking over Mr. Hans Stark's stock in the company was brought up for discussion, and it was the sense of the meeting that it was not policy at this time to continue taking over stockholders' interest" (p. 863).

A similar resolution was passed by the executive committee on February 3, 1909:

"A communication from John E. Thrash of Seattle, Washington, advising that he held a block of 25 shares of Fairbanks Banking Company stock for a client of his and was desirous of disposing of the same, and asking for information as to the value of the stock and if the bank desired to pur-

chase same. It was the sense of the meeting that an answer be directed to him that the bank did not desire to buy any stock at the present time, and that they furnish the last published statement of the bank" (p. 864).

And again on March 15, 1909:

"The following requests from stockholders as to the bank purchasing their stock was considered: H. B. Parkin 10 shares, O. E. Tackstrom 5 shares. It was the sense of the meeting that the bank observe the rule established at a previous meeting of the board wherein it was decided not to buy in any more of the bank's stock" (p. 864).

This last resolution was approved by the Board of Directors on April 12, 1909 (p. 864).

It will be seen that the evidence upon which the Court based its conclusion that the directors were chargeable with knowledge of the stock surrenders, was very slender, it being in fact confined to the resolution of July 13, 1908, and some special transactions, such as the surrender of Wood's stock (p. 200), which was taken back by previous agreement; the purchase of McGinn's stock which was done in order to save the bank from injury (p. 208); and the surrender of the Strandbergs stock (p. 206), which was taken in partial settlement of previous indebtedness. On the other hand, there was the positive testimony of the defendants that they had no actual knowledge of the most of the stock surrenders, and the record evidence of the minutes of the executive committee and board of directors above referred to.

VII.

THE DIRECTORS ARE NOT PRESUMED TO HAVE KNOWN OF THE PURCHASE OF THE STOCK BY THE OFFICERS.

In *Rudd* v. *Robinson,* 126 N. Y., 113, 22 Am. St. Rep., 817, it was held that:

> There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder.

In *First National Bank* v. *Drake,* 29 Kan., 311, 44 Am. Rep., 646, the Court said:

> "We do not think it can be said, as a matter of law, that the directors are conclusively presumed to know the general business of the corporation."

Knowledge of some of the directors does not imply knowledge of all:

> *Leggett* v. *New Jersey, Etc., Co.,* 1 N. J. Eq., 541; 23 Am. Dec., 728.

Directors are not responsible for illegal or negligent acts of the cashier or other officers by whom the bank is managed, if they have no knowledge of such acts and do not connive at them or wilfully shut their eyes and permit them.

The leading case is *Briggs* v. *Spaulding,* 141 U. S., 662, in which it is held that knowledge of all the affairs of a bank, or of what its books and papers

would show, cannot be imputed to a director for the purpose of charging him with a liability. The Court said:

> "Directors of a bank are entitled to commit the banking business to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention. * * *
>
> "'I know of no law,' said Vice-Chancellor McCoun, in *Scott* v. *Sepeyster,* 1 Edw. Ch., 541, 6 L. ed., 239, 'which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued; but, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable.'
>
> "Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman* v. *Dudley,* 51 N. Y., 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: 'He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of

charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents, and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.'

"And Sir George Jessel, in *Hallmark's Case,* L. R., 9 Ch. Div., 332: 'It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowl-

edge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *ex parte* Brown, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case.'

"We are of the opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation and did not themselves individually conduct an examination, during their short period of service; or because they did not happen to go among the clerks and look through the books, or call for and run over the bills receivable."

In the article on Banks, 3 R. C. L., 462, it is said:

"It is difficult to lay down any general rule by which the liability of bank directors for the acts of their subordinate officers can be measured. As the directors usually are men who are engaged in other pursuits, and who are not expected to devote their whole time and attention to the affairs of the bank, they must necessarily confide the active management of the business largely to their executive officers, and just what degree of supervision and control will be sufficient to relieve them from liability for the acts of such officers is rather uncertain. The courts have been reluctant to establish a strict rule of liability, lest, as has been frequently said, by so doing they deter men of integrity and ability from accepting the responsibilities of the position. Generally it is declared that directors must exercise reasonable care and

prudence, but this rule is necessarily indefinite, since in many cases it is hard to determine just what reasonable care and prudence would be. While it is incumbent on the directors to appoint all the officers necessary to carry on the business of the bank, and to use ordinary diligence in the selection of men qualified to fill such positions, they do not guarantee the honesty and diligence of the employees they select; and after having selected employees of unquestioned reputation they are justified in acting on the supposition that such employees will be honest. They are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason and until some circumstance transpires to awaken a just apprehension of want of integrity, they have a right to assume that such agents are honest and faithful. And it may be stated as well settled that directors who have exercised care to select honest men as cashiers or other officers are required to exercise only ordinary care and diligence in the supervision and control of their conduct, and are not responsible for losses resulting from the wrongful act or omission of those selected unless the loss is a consequence of their own neglect of duty."

Mason v. *Moore,* 76 N. E., 932;
Utley v. *Hill,* 49 L. R. A., 323;
Warner v. *Penoyer,* 44 L. R. A., 761;
Sweutzel v. *Penn. Bank,* 30 Am. St. Rep., 718.

VIII.

THE JUDGMENT OF THE DIRECTORS WAS CONCLUSIVE AS TO THE DIVIDEND.

It is the general law that the judgment of the directors, if exercised in good faith, is conclusive in the matter of dividends. If the directors, not having been guilty of negligence, were honestly of the opinion that the condition of the corporation warranted the declaration of the dividend, their action in so declaring it cannot be made the foundation of proceedings against them under a penal statute. It was necessary for the plaintiff to allege, and he did allege, that the defendants knew, or in the exercise of due diligence should have known, that the corporation had not net profits out of which the dividend could lawfully be paid. It was, however, necessary for him to go further and show that the statute under which he sought recovery rendered it immaterial whether the action of the directors was, or was not, in good faith, and whether such statute departed so far from the general rule that the directors were liable for the declaration and payment of the dividend, if in fact the profits did not exist, independently of whether they were guilty of any negligence or not. It was, therefore, as we have said before, necessary for the plaintiff to declare upon the statute of Nevada, which was an ultimate fact that he would have to plead and prove. Without the statute set

forth in the pleading he could not state a cause of action. Nor, as we have also said, was there any finding by the Court as to what the Law of Nevada was.

> "In the absence of any statute on the subject, the liability of bank directors for resulting losses, where they knowingly exceed their authority, is established without reference to the question whether or not what they did might be justified on the principle of reasonable care. But if they do not knowingly exceed their authority they do not necessarily incur liability. Thus, that the directors did not know it was unlawful to employ one of their number as an agent of the bank, and to give him a compensation in addition to his salary as a director for the performance of extraordinary services, will, it has been held excuse them from personal liability therefor."

3 *Ruling Case Law,* 460;
Goldbold v. *Branch Bank,* 11 Ala., 191, 46 Am. Dec., 211.

The law indulges the presumption that dividends have been declared out of the profits and not otherwise.

Van Dyke v. *Milwaukee* (Wis.), 146 N. W., 812;
Miller v. *Payne,* 150 Wis., 354, 136 N. W., 811;
Soehnlein v. *Soehnlein,* 146 Wis., 330, 131 N. W., 739;
Thompson on Corporations, Vol. 8, p. 564.

In the absence of a statute specifically covering the case, the rule is that, when the directors declare a dividend in good faith and without negligence, they are not to be held liable merely because the dividend turns out to have impaired the capital stock. Directors are not personally liable for dividends improperly paid, where they honestly believe in a state of facts which would justify the payment and rely upon the general manager's certificate as to the assets.

Cook on Corporations, Sec. 550.
Excelsior Petroleum Co. v. *Lacey,* 63 *N. Y.*, 422 (1875).

In *Stinger's Case,* L. R. 4 Ch. App. 475 (1869), it was held, in accordance with this view, that where the action of a board of directors in making a dividend was bona fide, they are not liable for errors of judgment in preparing a balance sheet showing the assets of the concern.

The directors are not personally liable for dividends declared, even though, in estimating the assets, claims are included which ultimately prove to be bad, the result thereby being that the dividend was paid out of the capital.

Re London & Gen. Bank, 72 L. T. Rep., 227 (1894); aff'd. (1895), 2 Ch., 166, 673;
2 *Kingston Cotton Mill Co.* (1896), 1 Ch., 331.

Directors are not liable for illegal declaration of dividend when acting in good faith.

2 *Clark & Marshall,* Sec. 528 (e);
Excelsus v. *Lacey,* 63 N. Y., 422;
Chick v. *Fuller,* 114 Fed., 42;
5 *Thompson,* Sec. 5325, and cases cited.

It may be said as a prime rule, in common law actions against directors of an insolvent corporation, for damages on the ground of declaring and paying dividends with knowledge that the corporation's capital was impaired, fraud and bad faith must be proved in order to warrant a recovery.

5 *Thompson on Corporations,* Sec. 5324. Cases cited.

Nor can the directors be held personally liable for money paid out for dividends to a greater amount than net profits, after deducting losses and bad debts, because there were bad debts in fact but supposed to be good; bad judgment without bad faith not making the directors individually liable.

Tiffany on Banks, Sec. 99, page 380.

The fact that a stockholder in an insolvent bank, having a capital stock of $200,000 at the time he sold and transferred his stock, was a director and was dissatisfied with the management, is not sufficient to charge him with knowledge of its insolvency

so as to render him liable for a subsequent assessment on the stock, although it was in fact insolvent, where its assets on their face largely exceeded its liabilities and it appeared that the directors were deceived as to their value.

Fowler v. *Grouse,* 175 Fed., 646.
Clews v. *Bardon,* 36 Fed., 617.

In *Lexington* v. *Bridges,* 7 B. Mon., 556, 46 A. D. 528, it was held that the directors of a corporation are not personally liable to creditors of the company for the amount of a dividend declared by them at a time when there were no profits to be divided, if they acted in good faith in a mistaken belief that such a fund existed.

The Court said:

> "Bridges, having an unsatisfied judgment against the railroad company, upon which an execution had been returned no property, brought this suit into chancery, to obtain satisfaction of his judgment, making various individuals defendants, alleging that some of them were indebted to the company on account of the reception of illegal dividends, others on account of stock subscribed, and that others had acted as directors and managers of the affairs of the company, and by declaring a distribution of the profits, when no profits existed, had by their illegal management of a fund set apart by the charter for the payment of the debts, of which they had the control, rendered themselves individually liable to the creditors of the company.

"The individuals who acted as directors at the time the dividends were made, rely in their defense on the following grounds: First, that there were net profits to divide, and consequently the declaration of the dividends was legal, and authorized by the charter. Secondly, if there were no profits to divide among the stockholders, that in declaring the dividends they acted in good faith, under a mistaken conception, it may be, of what constituted profits, and without a full knowledge of the actual state of the affairs of the company, having been misled by an incorrect exposition of its condition persented by the officer regularly appointed and authorized under the charter to keep its accounts, but without any wrongful intention on their part, and that therefore they are not individually responsible. * * *

" * * *We are not of opinion that in directing the payment of these dividends, there was anything fraudulent on the part of the directory. They no doubt believed that they were acting legally and properly. They supposed that profits existed, when in reality there were none. If they are to be held individually liable on account of this mistake, it must be on the ground that if it were an error of judgment, by accepting the office, they professed to be in the possession of the skill and qualifications necessary for a faithful discharge of all its duties, and are therefore not exonerated when the injurious act results from the absence of such qualifications, or if it were a mistake of fact that in accepting the position they occupied, they assumed the discharge of certain duties to the company and to those persons dealing with it, the faithful performance of which required the exercise on their part of unremitting vigilance in relation to the condition of the matters intrusted to their control, as well as a reason-

able and prudent discretion as to the manner in which they were managed, and that they failed to use as much vigilance on the occasion as the responsibility of their position imposed on them. We are satisfied, however, that if they were guilty of negligence to any extent, it is not of that gross and palpable character that would render their conduct so reprehensible as to subject them to the imputation of a personal or even a legal fraud."

Judge Thompson lays down the rule, as follows:

"These statutes [imposing liability for dividends improperly declared] are penal in their nature, and obviously do not make the directors liable where the dividend is declared in good faith, they believing at the time that the company is solvent, and upon reasonable grounds. Probably directors would not be held liable under such a statute, where the belief in the company's solvency was an error of judgment attributable to negligence, unless the negligence was of so gross and flagrant a character as, in the eye of the law, to be equivalent to actual fraud."

3 *Thompson on Corporations,* Sec. 4295.

In *Tradesman Pub. Co.* v. *Knoxville C. W. Co.,* 95 Tenn., 634, 49 A. S. R., 959, the Court discusses the effect of a charter provision imposing a liability of this character and says:

"It is next assigned as error that the chancellor refused any relief against the directors on account of the payment of dividends, amounting to $28,000. It is contended by counsel that said dividends were paid at a time, and under circum-

stances that rendered the payment unlawful, and was a diversion of the assets of the corporation. The charter of this company provides, viz., 'If the directors declare and pay any dividend when the company is insolvent, or which declaration of a dividend would diminish the amount of the capital stock, they shall be jointly and severally liable to creditors for the amount of dividends thus declared. Any director may avoid liability by voting against the dividend, or by filing his objections, in writing, as soon as he ascertains a dividend has been made.'

"The dividends in question were paid, viz.: April 30, 1884, four per cent, $4,280; April 30, 1886, four per cent, $4,280; April 30, 1887, four per cent, $4,280; April 30, 1888, four per cent, $4,280; April 30, 1889, five per cent, $5,350; April 30, 1890, six per cent, $6,420. It is insisted that the first dividend, paid April 30, 1883, was paid out of the proceeds of the bonds which had been sold by the company at a discount of twenty-two per cent, and that the remaining dividends were paid at a time when the corporation was insolvent, and when its indebtedness exceeded the amount of the paid-up capital stock. The chancellor, upon the hearing, was of the opinion that the directors were warranted in the payment of these dividends, and that the defendants were not liable to the creditors of the corporation. It is true, as argued by counsel, that when these dividends were declared, the indebtedness of the corporation did exceed the amount of capital stock paid in, but, under the statute last cited, this fact does not determine the liability of directors. The inhibition of the statute is against declaring dividends when the company is insolvent or when such dividend will diminish the amount of the capital stock. If the assets are reasonably worth, *or are honestly*

believed to be worth, largely more than the company's indebtedness, and upon this basis profits are estimated, the company is not insolvent, although its indebtedness may exceed its capital stock paid in. The record discloses that when these dividends were declared, this company was engaged in a very extensive business, and was realizing large receipts from the sale of the products of its manufacture. Its assets were estimated by its directors to be largely in excess of the company's liabilities, and the proof shows that said assets, which consisted largely of mineral lands, were largely more valuable then than at a later period. The proof indicates that during the years covering the declaration of dividends the company was realizing enough profit on its business, and there was no reason why those profits should not have been distributed among its stockholders. The conduct of the directors is to be viewed in the light of the financial status of the company at that period, and not to be determined by its ultimate insolvency, precipitated, doubtless, by the universal paralysis of business then prevailing throughout the country. When the large volume of business transacted by this company is considered, it is not perceived how its insolvency could have been superinduced by the small dividends declared. We are of opinion there was no error in the action of the chancellor upon this branch of the case."

Again in *Witters* v. *Sowles,* 31 Fed., 3, the Court said:

"This bill is not brought to charge the defendants for money received by them as stockholders from dividends, but for losses to the bank itself for unlawfully or wrongfully declaring dividends.

"By Section 5204, dividends to a greater amount than net profits, after deducting losses and bad debts, are prohibited; and debts on which interest in past due and unpaid for six months, unless well secured and in process of collection, are defined to be bad debts. The assets of this bank did not so consist of bad debts, within this definition, at the time when they were made, as to make the dividends improyer. There were debts which were in fact bad in the result to an extent so great as to wipe out the profits from which dividends could be made when the later ones were declared. The defendant Burton is not shown to have participated in making the dividends. Those who did misjudged as to the value of the assets. The evidence does not warrant the conclusion that they took this method of dividing the assets of the bank among themselves when they knew that dividends could not properly be made. It is not considered, therefore, that the defendants are liable for the amount of the dividends because they were unlawfully or wrongfully declared *Spering's Appeal,* 10 Am. Rep., 689; *Thomp. Liab. Off.,* 351; *U. S.* v. *Britton,* 108 U. S., 199, 2 Sup. Ct. Rep., 531."

IX.

THE DIRECTORS WERE ENTITLED TO BELIEVE THE CORPORATION IN POSSESSION OF A SURPLUS AT THE TIME OF THE DECLARATION OF THE DIVIDEND.

The assets, as shown by the statement of April 12, 1910 (p. 385), consisted of moneys due from sundry banks; coin in hand; dust on hand and real estate. About these items there was no question. The assets also included sundry stocks carried on the books at

$654,449.00, and loans and discounts carried on the books at $338,410.94. If these last two amounts represented the true value of the items, the corporation was solvent and a surplus existed from which a dividend might be lawfully declared.

Among the stocks included in this statement, and the only one questioned, was the stock of the Gold Bar Lumber Company, which was carried at $341,949.00. There was no finding that said Gold Bar Lumber Company stock was not of that value. The only findings on that subject were:

> "That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of $341,949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum" (p. 199).
>
> "That at the time said investment was so made as aforesaid, said Lumber Company was closed down and immediately prior to closing down, it had been operated at a loss, that in so far as said lumber company was able to operate since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill is standing timber was being consumed and its best asset exhausted. That no dividends have been paid on the capital stock of said lumber company during the time the same was owned by said bank" (p. 204).

It will be seen that these findings do not determine anything as to the value of the Gold Bar Lumber Company, and are entirely consistent with the value of the Gold Bar Lumber Company, being the amount at which it was carried on the books of the company.

We shall show further on, by the evidence, that the directors were entitled to consider the Gold Bar stock as worth that amount.

The only other item about which there could be any question was the bills receivable. On this subject there is no direct finding either. There was a finding:

> "That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as 'doubtful account' the sum of $22,979.99 and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent. thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to-wit, $22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of $12,860.61. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of $12,192.80" (p. 202).

but there was no direct finding that the notes and bills receivable were not worth their face value, ex-

cept in the single case of the notes of the Tanana Electric Company, of which more hereafter.

Nearly every item embraced in the bills receivable was gone over at length, at the trial, and from the testimony of the witnesses it is plain that the condition of affairs was such as to justify the directors in believing that the true value of the bills receivable was what it was shown to be upon the books of the company. (See pp. 867-890; 703-717; 836-848.)

There is no evidence, however, beyond the fact that the notes are past due and unpaid, to show that they are now valueless, or that they were valueless on the 12th day of April, 1910, on the 31st day of December, 1909, or at the time they were passed on by the Committee of Stockholders and accepted as valid assets by the original Fairbanks Banking Company at the time of the transfer from the partnership to the corporation.

In considering the value of the bills receivable and the good faith of the directors in that connection, it is important to remember the conditions under which the banking was conducted at Fairbanks. In a remote mining camp like Fairbanks any bank which failed to extend its accommodations to the miners might just as well go out of existence. Loans which would be highly hazardous if made by a bank under normal conditions in the United States might be conservative loans under conditions which existed at Fairbanks.

The method of procedure was frequently this: The owner or lessee of a placer claim which prospected well would apply to the bank for a loan to enable him to conduct his mining operations. This loan he would secure by a mortgage on his interest in the claim, as well as his working tools and machinery. The value of the claims on the various creeks was well known to the bank, and the bank had a representative on its Board of Directors from each of the principal creeks, with the object in view of being able to pass intelligently and accurately upon any applications that might be made for loans. Nor did the banks look alone to the interest on these loans for their revenue; a large part of their business consisted in dealing in the gold dust. The existence of the loan and the bank's assistance in the development of the claim, thereby gave it a first call on the proceeds, very much to its credit.

Luther C. Hess, cashier of the First National Bank, gave an interesting account of the customary procedure (p. 881).

> "Q. Will you state for the purpose of the record, and the information of the Court, just what the ordinary transaction was when a miner took a lease upon a piece of undeveloped property,—mining property,—and found what apparently was the paystreak.
>
> "Q. What was the almost universal practice of a miner under those circumstances?
>
> "A. If a miner had taken a lease on property that he supposed had value, or he had already

sunk a shaft and shown value, and was unable to finance the proposition himself, he usually obtained some credit from the merchants—a considerable credit usually—then, in order to pay necessary bills, he usually borrowed from the banks, sometimes giving a mortgage on his machinery and sometimes not.

"Q. And a mortgage on his leasehold?

"A. Sometimes a mortgage on his leasehold.

"Q. The bank having made such a loan, what was the practice of the bank when the loan fell due?

"A. If the man was able to go on, or if there was any chance of him going on, the bank would be very careful not to put him out of commission, because it would stop the development of the country and stop the operations.

"Q. In your experience have you observed many cases where loans of that kind have been made resulting in great profit to the borrower and to the bank? (p. 881).

"A. I know that that has been almost the universal practice with the banks, and most of those have been paid.

"Q. From your experience, would you say that it was an exercise of good judgment on the part of the bank not to force the collection of the loan at the time it fell due, under those circumstances?

"A. Well, of course, you would have to judge every instance by itself. But, as a rule, I should say that was true.

"Q. What is the fact, from your experience and observation, as to whether that practice, that course of dealing by the banks, has resulted largely in the development of this country?

"A. It certainly has.

"Q. What would you say in regard to the ability of the majority of the miners who have opened

and developed and operated ground, to finance their operations in the first instance?

"A. As a rule they have not been able to finance their operations. That has been the exception rather than the rule.

"Q. Financing the operations of a miner, whether he was a layman or owner, results generally, or did it generally result in that miner bringing to the bank the gold-dust which he produced?

"A. That was one of the considerations that entered into the reason for the bank advancing to the operator, because one of the principal profits of the banks in this portion of the country is derived from the purchase and sale of gold-dust, and all of the banks have been striving as much as possible to get the greatest share of the gold-dust.

"Q. That was the principal cause of this fierce competition, that has been testified about?

"A. Yes, sir" (pp. 882-883).

It appeared from the evidence that a great deal of the paper held by the bank was past due. Counsel for the Receiver seems to attach a fearful import to the expression "past due paper", as if the fact that the paper past due necessarily meant that it was worthless. As a matter of fact much of the paper in banks under normal conditions is past due paper, and frequently the very fact that it is adequately secured, or that the makers are considered perfectly solvent, impels the bank to leave the paper as matured paper, rather than have it renewed, and thereby part with its right to collect on demand.

W. H. Parsons, who had been in the banking business in Fairbanks, testified on this subject as follows (p. 565):

"Q. State whether or not it was customary among the banks in Fairbanks at that time to hold paper overdue without having it renewed?

"A. In some instances, yes.

"Q. Why didn't you have the paper renewed in these particular cases I have enumerated?

"A. In many instances the notes were secured notes, either secured by a chattel or real mortgage, and in that instance we obviously would prefer to continue the old notes rather than to take new notes.

"Q. Why?

"A. Well, in that country during the interim of taking the new note, the mortgage would describe a specific note due at a specific time; now if we were to take a new note and for any reason there should be a transfer, that there should be a change in the records as regards the ownership of the property during that interim, it is just barely possible that there might be some change like that, and that would necessitate an abstract and looking it up, which was always expensive. We preferred to retain our original note. Then again, many times, a renewal of a note was not made because there would be an endorser and the endorser would be outside or he might be in the Iditarod or some other district" (pp. 565-566).

John L. McGinn testified as follows:

"Q. State briefly what was the declared practice of the bank with reference to making loans and pressing the collection of them promptly at maturity or otherwise; what the policy was?

"A. It was the custom of the Fairbanks Banking Company, as well as the other banks, for instance if a man had a piece of ground out there and put down a shaft and struck pay and he would want to get money, they would send a man out to investigate and see what he had. If they thought that the prospect or the showing that the ground had made was sufficient to warrant them in making a loan, they would do so, and they would carry that man according to the conditions that arose in each particular case. It was a matter that they had to exercise judgment about. You could not lay down any fixed rule in regard to when that note should be collected, or how long it should be allowed to run. The banks always took—that is true of all the banks—ample security at the time they made the loan. Whenever they advanced any money upon a piece of mining ground, they thought that ground would produce the money (pp. 928-929).

"Q. How was that ascertained; from the prospects of the ground?

"A. Take the Fairbanks Banking Company. One of the ideas in having directors from the various creeks, like Jesson on Ester, Yarnell on Dome. I know this was talked of at the stockholders' meeting. Bob Sheppard on Fairbanks Creek, McMullen out on Goldstream, Charley Robinson was operating on Vault Creek at that time. One of the conditions was that if any miner from any of those creeks came in and required a loan, then they would telephone out to one of these directors and have them go down and examine the ground; and in case they didn't have a director upon the creek, then they would send a man out. Originally they had men employed for that purpose. I have known Tom Carroll to

be employed to pass on property on Dome Creek, and other men.

"Q. The directors were chosen with a view to their knowledge of the mining industry?

"A. Yes, sir.

"Q. And their competency to judge of the value of the ground?

"A. Yes, sir, that was taken into consideration.

"Q. And they were frequently consulted by the bank's officers with reference to the collection of past due paper?

"A. Oh, yes.

"Q. And the question. of the advisability of what course and policy to pursue?

"A. Yes, sir.

"Q. Now, from your knowledge of the situation, your experience as an attorney and as one of the directors, do you say the directors exercised good judgment in refusing to press claims immediately when they became due?

"A. I think so" (pp. 929-930).

It does not appear what if any effort was made by the Receiver to collect any of this past due paper. The testimony is that it is still in his hands and uncollected, but nowhere does it appear that he has taken any active steps to enforce payment of these various obligations. It is a well-recognized fact that the closing of any business, particularly by bankruptcy, is ruinous as far as the value of the accounts owing is concerned. Apart from the fact that no further favors are to be received from the institution, and thereby the motive to maintain an unimpaired credit with it is removed, is the fact that the money

instead of being owed to the person from whom it is borrowed, is now owed to a number of creditors of the bankrupt with whom its debtors have no personal relation.

We submit that the directors were entitled to treat all of the assets as worth their book value, not excepting the Gold Bar stock and the Tanana note which we shall now proceed to consider.

X.

THE DIRECTORS WERE ENTITLED TO TAKE THE GOLD BAR STOCK AT ITS BOOK VALUE.

In its opinion the Court said:

> "the stock of the Gold Bar Lumber Company was still carried for the same amount as when taken over by the partnership, more than two years before, although no dividends whatever had been paid thereon, and a large amount of the standing timber upon the lands of that company had been cut, turned into lumber and sold, and the proceeds either used up in expenses or in maintaining and enlarging the equipment of the plant. The evidence as to the actual value of the assets of the corporation at this time is scarcely sufficient to form a basis of an accurate calculation. The testimony, however, does show that the value of the Gold Bar stock was less than it was in 1907 or 1908" (p. 1231).

At another point of the opinion the Court states:

> "nor has the evidence shown that the valuation placed upon the stock of the Gold Bar Lumber

> Company was shown to be excessive, or that the directors had any good reason to believe that it was excessive. There has been considerable evidence produced concerning the value of this stock at various times, from the time it was purchased by the partnership in 1906 to the present time, but the only evidence that can be really considered as reliable, as showing its market value, is that during the present year [1914] it was sold at public sale in Seattle for the sum of $100,000.00. The uncertainty of the evidence concerning its value is clearly apparent from the testimony of the officer of the bank making this purchase, given shortly after the sale was made, to the effect that he then considered it worth $300,000.00" (p. 1213).

The evidence shows that at the very first meeting of the board of directors the following resolution was adopted:

> "Resolved, that the board of directors obtain from Dexter Horton Company of Seattle, Washington, an estimate of the total value of the Gold Bar property. Carried" (p. 225).

M. W. Peterson testified that he was the cashier of the Dexter Horton National Bank of Seattle, Washington; that he received a telegram from the Fairbanks Banking Company as follows:

> "Please advise by telegraph at the earliest possibility last reliable report of valuation Gold Bar property. What is opinion of yourselves regarding property?" (Trans., p. 523).

He made an investigation of the reasonable, fair value of the Gold Bar property and replied to the Fairbanks Banking Company that he believed it could be sold for $425,000,000 (p. 526). This was in March, 1908.

His full report was as follows:

"Fairbanks Banking Co.,
"Fairbanks, Alaska.

"Gentlemen:

"We duly received your telegram of the 14th inst. as follows:

"'Please advise by telegraph at the earliest possibility last reliable report of valuation Gold Bar property. What is the opinion of yourselves regarding property? Wood will explain what we mean by Gold Bar property.'

"On receipt of your telegram we immediately secured what information we could concerning the Gold Bar Lumber Co., including a statement made by that company dated Oct. 12/07. We later secured from Mr. Armstrong, Manager and Treasurer of the company, an itemized statement of Mar. 1st 08, together with a copy of the company's trial balance of that date.

"We have made a careful examination of the statement, and taking it for granted that the figures in the statement are approximately correct, we have arrived at the conclusion that the company is in excellent financial condition considering the present financial and business conditions prevailing throughout the country. After eliminating all resources with the exception of camp equipment, lumber and logs on hand, mill plant, cash, real estate, merchandise in store and accounts receivable, and with these above-mentioned

resources conservatively reduced in amount, and estimating the timber of the company worth $300,000, we find that for the purpose of arriving at a basis on which a credit for the company could be figured, it has total resources of $450,000.00 against liabilities of $75,000.00 showing a net worth of $375,000.00. This, of course, is not the figure at which the property would be valued in the event of a sale, but is merely the valuation that we as Bankers would give the property were we considering a loan on it.

"According to the statement furnished us by Mr. Armstrong, the gross resources of the company amount to $526,000.00, which we believe to be a conservative valuation as we are informed that a reasonable amount is charged off each year for depreciation. We have therefore telegraphed to you as follows:

" 'In reply to your telegram of Saturday, property is worth in our opinion $375,000.00 for a firm basis of credit. Believe it can be sold for more than $425,000.00. Opinion is based upon statement March 1st and independent investigation.'

"We do not know for what purpose our opinion on this property is wanted, but we have been as fair as possible in making the above estimates, and trust that our opinion will be of some service.

"Yours very truly,

"Cashier" (pp. 990-992).

At the time of the trial, Peterson valued the property at $300,000, and stated that in 1908 and 1910 its value was greater (p. 528).

R. C. Wood testified:

"Q. I will ask you to state whether or not at that time [the time of the transfer] you believed that Gold Bar was worth the sum of $341,949?

"A. We had no reason to believe any other way. We were submitted statements by the manager of the Gold Bar Lumber Company every month. Captain Barnette had come in from the outside with glowing reports of the concern. He said the timber was increasing in the neighborhood all the time.

"Q. That it was increasing in the neighborhood?

"A. That the value of timber was increasing in the neighborhood.

"Q. You had received communications from outside people, too, had you, in regard to it?

"A. Yes, sir. We had received communications from Dexter-Horton Company; and I think the National Bank of Commerce advanced credits against Gold Bar in excess of $300,000" (pp. 727-728).

J. S. MacKenzie, who had been foreman, superintendent and the manager of the Gold Bar Company sawmill, testified that the net resources of the Gold Bar Lumber Company on October 1st, 1908, were $438,164.71 (p. 486), and that they were about the same in March, 1908. This valuation included 150,000,000 feet of timber, at $2.00 a thousand (p. 484). This was based on a cruise that was made, and it was the experience of the company that the timber ran ahead of the cruise about twelve and one-half per cent. (12½%). (p. 494.)

The value which the board itself placed upon the property was shown by the minutes of the meeting of the board of directors of the Fairbanks Banking Company held upon the 12th day of April, 1909.

> "Discussion as to the advisability of selling the Gold Bar property was had in full and it was the sense of the meeting that the same be sold for $450,000, with $100,000 cash payment, and the balance payments at $50,000 every three months until paid. The officers were instructed to so advise Mr. Armstrong, manager, and advise also that it is desirable that he place the property in the hands of a responsible timber land agent for disposal."

and by the minutes of the meeting of directors of August 12, 1909:

> "A communication from Gold Bar Lumber Company dated July 24, 1909, enclosing monthly report of June, was read and ordered filed. A telegram from the same company, under date August 12, 1909, referring to sale of Gold Bar property and asking for price and terms was read and ordered filed. The board discussed the Gold Bar Lumber Company's affairs quite fully and decided upon the price and terms as follows: $340,000 for our undivided four-fifths interest in the property on the following terms,—$50,000 down, and the balance in $25,000 payments every 60 days until paid, bearing interest at the rate of six per cent. per annum. This offer to be made on condition that it be accepted within thirty days" (pp. 729-731).

We submit that the evidence is insufficient for the Court to find that this property was worth any less at the time of the declaration of the dividend, than the amount at which it was carried on the books. The only witness who testified to this effect was Mr. Johanson, and when he was asked "What was the value of the capital stock of the Gold Bar Lumber Company in March, 1908?" he answered, "Well, if I was to have sold Gold Bar at that time I was figuring on a basis of about the original purchase price plus interest from the time we bought to the time of selling. However, I would not state that to be the actual value, because I was a minority stockholder and what I would have sold out for would not have probably fixed the value" (p. 311). After considerable prodding by the plaintiff's attorney, he testified that the fair, reasonable value to be placed on the property in March, 1908, was the original purchase price, plus interest from the time it was bought up to that time (p. 312). And that was the same basis at which he arrived at the value on June 30, 1908 (p. 327). This property was necessarily of a fluctuating value, being directly affected by the condition of the lumber market (p. 329).

His reply, "the original purchase price plus interest," showed plainly that what he meant by value was book value, and the price at which the property should be carried on the books, or as it were, the invoice value.

His real opinion, however, is shown by his letter of Oct. 13, 1913 (p. 530) and the accompanying statement (p. 995) in which he shows the net value of the property in that year to be $344,941.92 after charging off bad accounts and depreciation.

In passing we may comment on the fact that while this witness is the only one to testify that the value of Gold Bar fell off each year, his method of fixing the value, viz., "on original purchase price plus interest" would have given it an increasing value as time went on.

Last but not least the directors were furnished with the annual statements of the Gold Bar Lumber Co. (pp. 996 *et seq.*) which showed net resources as follows:

Oct. 1, 1908—$438,164.71 (p. 998).

Oct. 1, 1909—$438,754.61 (p. 999).

Oct. 1, 1910—$449,471.41 (p. 997).

They were not directors of the Gold Bar Lumber Co. and were entitled to receive these statements as true reports of the conditions of that company.

XI.

THE DIRECTORS WERE ENTITLED TO TREAT THE TANANA NOTES AS WORTH THE AMOUNT AT WHICH THE BANK CARRIED THEM.

In this particular, the Court found as follows:

> "That of said notes so past due as aforesaid there were two executed by the Tanana Electric Company in the sum of $27,997.38 which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said board of directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of $27,997.38" (Assignment of Error No. 23, p. 199).

And its opinion on this subject was as follows:

> "It appears, moreover, that during all this time the bank was carrying a large amount of paper long past due; and while the directors may in fact have relied upon the statements of the officers of the bank, and the reports made by them as showing the true condition of the bank's affairs, it would seem that reasonable diligence on their part would have revealed that among these assets were many of so doubtful a character as to require their deduction from the assets of the bank. This

is particularly true of the note of the Tanana Electric Company, dated December 16, 1907, for the sum of $27,997.38, the maker of which was in the hands of a receiver, and in a hopelessly insolvent condition. And while it was in evidence that the original incorporators had relied upon some alleged guarantee of this amount by either J. E. Chilberg or the Scandinavian-American Bank of Seattle, it was well known that this guarantee had been repudiated by them, and that any attempt at collection from them would be strenuously resisted" (p. 1129).

The testimony showed that Mr. Chilberg, who was the Vice-President of the Scandinavian-American Bank of Seattle, made an arrangement with the Fairbanks Banking Company to advance money to the Tanana Electric Company. The testimony of James W. Hill was quite explicit on the subject:

"Q. Now, I wish you would go on and state in your own way what you know in reference to this Tanana Electric Company loan.

"A. In the summer of 1906 Mr. J. E. Chilberg, vice-president of the Scandinavian-American Bank, came to Fairbanks. One of the objects of his visit was to finance, or help finance, the Tanana Electric Company, which was then operating on Cleary Creek, at the mouth of Cleary Creek. They were then operating with a small plant, and of course their power was limited. Mr. Chilberg had some plans for the installation of water power by turbines, and he wanted to get some local people interested in the project along with the people who had subscribed for stock in Seattle, and he circulated a subscription list among some of the people whom he was acquainted with

here, with the result that some $40,000 was subscribed—$70,000 worth of stock was subscribed, to be paid for at a certain given date. One of the conditions of the subscription was that the Scandinavian-American Bank would advance the sum of $100,000 for the installation of this power plant—water power plant. The Tanana Electric Company were to give a first mortgage to the Scandinavian-American Bank for $100,000, which was subsequently done and the mortgage sent out to Seattle. At the time that these subscriptions fell due, the local subscribers paid in something like $40,000 in cash, which was remitted to the Scandinavian-American Bank or to Mr. Chilberg at Seattle.

"Q. Who was that paid to?

"A. I think it was paid into the bank.

"Q. And by the bank—

"A. And by the bank remitted to Seattle. The balance of that subscription was the subscription of Mr. Volney Richmond, for which I understood he gave a note to Mr. Chilberg. Anyway, it was a personal transaction between them, as to how he should pay for his stock. The other $5,000 I think was a subscription of Mr. Chilberg himself, in addition to what he had originally subscribed. After the mortgage had been prepared and sent out, the Scandinavian-American Bank or Mr. Chilberg transferred a credit to the Fairbanks Banking Company of $18,500.

"Q. Why did they transfer that? What was the arrangement between Chilberg and the bank in regard to the bank advancing any money?

"A. I testified the other day that there was some document in existence at that time in the nature of an authority for the bank to advance that money and be reimbursed by the Scandinavian-

American Bank until the full amount of the mortgage had been disbursed.

"Q. What was the arrangement in regard to when the bank was to be paid for these advancements?

"A. From time to time.

"Q. State what the arrangement was.

"A. I don't remember the exact wording of this document.

"Q. I don't care about the document, but the understanding between you outside of the document.

"A. The understanding, you mean, between Chilberg and the Fairbanks Banking Company?

"Q. Yes.

"A. This document I have in my mind at the present time was signed by Mr. Chilberg as vice-president of the Scandinavian-American Bank. The officers of the bank never felt for one moment that they were advancing the money to the Tanana Electric Company on the credit of the Tanana Electric Company, but were making advances to the Tanana Electric Company for which they would be reimbursed by the Scandinavian-American Bank from time to time.

"Q. What was the understanding as to how these advances should be made, and how you were to be credited?

"A. We were to telegraph the Scandinavian-American Bank from time to time as money was required, and they would in turn credit bank account.

"Q. When money was required by whom?

"A. When money would be required by the Tanana Electric Company to pay their pay checks.

"Q. Did you advance them the money here, and then telegraph to them that you had done it?

"A. Yes, sir.

"Q. State what the arrangements were and what you did in that respect?

"A. I don't know that we had advanced the full amount of $18,500 that we telegraphed for the first time, but we had advanced a good portion of it. The books will show exactly what had been advanced. You know I am testifying from memory as to matters that happened seven years ago, and I have not referred to the books before going on the stand. My recollection is that we had advanced the major portion of $18,500.00 before we telegraphed to the bank for that amount of credit to our account, which they credited to our account, but instructed us to send a note for that amount. That amount was exhausted immediately and we commenced to advance more money until we had advanced some $25,000, at which time we again telegraphed, and received a credit. Then, subsequently, we kept on paying pay checks right along, and felt that we were absolutely secure. And in the fall, along towards the end of September, Mr. Richmond went outside with the understanding with the bank—I heard him talking with Mr. Wood—that as soon as he got to Seattle he would arrange with Mr. Chilberg to apply the whole balance of the $100,000 to our credit and have it telegraphed into Fairbanks to reimburse the bank for what they were advancing in the meantime. He knew we were paying those checks right along—and that this balance of that money so transferred would reimburse the bank for what they had advanced up to that time and take care of any future demands in connection with the work.

"Q. What position did Mr. Richmond occupy?

"A. He was manager of the Tanana Electric Company.

"Q. Did you receive any word from Mr. Richmond?

"A. I didn't receive any word direct, but I saw a telegram from Mr. Richmond.

"Q. To whom?

"A. To Mr. Wilson, who was their secretary at that time. He brought it over to the bank and showed it to me.

"Q. What were the contents of that telegram?

"A. It was to the effect that Chilberg was absent in the East and was expected to return in ten days or two weeks, at which time the matter would be arranged; and that Richmond was leaving that night for San Francisco.

"Q. Arrangements in reference to this advance of money?

"A. Exactly. So we kept on advancing money until the amount reached approximately $30,000, and I figured that by that time we should have heard from Mr. Chilberg; that the time had elapsed so that he should be back in Seattle, and I knew that there was a financial flurry threatening on the outside, and I telegraphed Chilberg that the advances to the Tanana Electric Company, up to that time were so much, and asked that he credit the account of the bank, and telegraph us; furthermore, in my message I think I said that unless that credit were placed immediately we would have to discontinue making, or paying any more checks of the Tanana Electric Company. He came back with a wire, which I believe is in evidence, that we should make no further advances to the Tanana Electric Company, which telegram was followed up with a letter explaining financial conditions on the outside.

"Q. Then what did the bank do in the way of obtaining any paper?

"A. At that time, we had never taken any notes

from the Tanana Electric Company until telegraphed to do so by the Scandinavian-American Bank; we simply carried the account as an overdraft, and when that credit was transferred by telegraph, we charged the Scandinavian-American Bank and credited the checking account of the Tanana Electric Company. But at that time when Chilberg wired back to make no further advances, or on or about that time, this Tanana Electric Company showed an overdraft of about $30,000, and as I remember, I went upstairs and consulted you in regard to the matter, and you advised me that I take a note.

"Q. Take the note of whom?

"A. From the officers of the Tanana Electric Company here, Mr. Claypool and Mr. Wilson, which I did, because we were not in the habit of carrying any large overdrafts.

"Q. Those are the notes that you subsequently carried in the bank?

"A. Those are the notes that we subsequently carried in the bank, and we expected the Scandinavian-American Bank to pay it.

"Q. I will ask you if in March, 1908, you regarded that as a good claim against the Scandinavian-American Bank?

"A. I did.

"Q. How would you regard that claim in April, 1910?

"A. I would say that at that time it was still good.

"Q. Do you know whether or not the Scandinavian-American Bank had advanced against this?

"A. Yes. They took care of some of our drafts at that time which were being presented in Seattle to the amount I think of some $10,000, which account was carried on the books I think up until

the time I left; in other words, we owed the Scandinavian-American Bank on our books, as against that credit, some $10,000.

"Q. Did the Scandinavian-American Bank ever make any demand for that $10,000?

"A. Not to my knowledge. I might say further that in connection with this Tanana Electric Company, in the fall of—early spring of 1909, Mr. Claypool went outside to Seattle and took with him all the data that we could give him at that time, with the idea that he was going to force the Scandinavian-American Bank to come through with the balance of that mortgage.

"Q. Do you know whether or not he had this order or guaranty?

"A. I think Mr. Claypool had it at that time. I am reasonably sure I saw it in his office one time.

"Q. Is that the last you have ever seen of it?

"A. Yes.

"Q. You testified Mr. Claypool was an attorney?

"A. Yes, sir.

"Q. Did you ever hear him express an opinion as to whether that guaranty was binding upon the Scandinavian-American Bank?

"A. Not only Mr. Claypool, but the trustees. There were several other trustees of the Tanana Electric Company in town here, and they thought at all times that we were absolutely secure and protected on those advances (pp. 788-795).

"MR. RIDER—Q. Was it explained by you or by Captain Barnette to the depositors' committee that you had such communication from the Scandinavian-American Bank?

"A. Everything was shown to the committee.

"Q. You showed that to the depositors' committee?

"A. Yes, sir.

"Q. Showing that the Scandinavian-American Bank had repudiated the guaranty?

"A. I wouldn't say that they had repudiated the guaranty. They had simply said they would make no further advances on account of the financial condition at that time.

"Q. This is the correspondence that was shown to the depositors' committee?

"A. It must have been. The whole circumstances of that was gone into in detail.

"Q. In connection with that, you say there was also shown to the depositors' committee some instrument in writing, and you say the last you saw of it was in the possession of Mr. Claypool?

"A. Yes.

"Q. It was also shown?

"A. Yes, sir.

"Q. And it was known to the depositors' committee that this account was in dispute, and the liability of the Scandinavian-American Bank was in dispute?

"A. No. I wouldn't say that the liability of the Scandinavian-American Bank was ever in dispute, nor did the depositors' committee think so.

"Q. Do you mean that; 'ever in dispute'?

"A. At that time certainly not.

"Q. It did become a matter of pretty serious dispute?

"A. It might have. But at that time there was no question in my mind, nor in the minds of the depositors' committee, but that that was a legal obligation and one that would be taken care of by the Scandinavian-American Bank.

"Q. You had absolutely no doubt of that in your mind?

"A. In fact, to go back a little. When Mr. Wood was in Seattle Mr. Chilberg promised to make that credit to our account, but subsequently

declined, stating he couldn't do it then; that the directors had shut down absolutely on all loans.

"Q. While Wood was there he did get that promise out of Chilberg?

"A. Yes, sir, and he so wired us.

"Q. And the next day he wired that Chilberg had declined to deal with you?

"A. Yes, sir" (pp. 816-817).

R. C. Wood testified as follows:

"Q. What arrangement, if any, was made by Mr. Chilberg to have the Scandinavian-American Bank and the Fairbanks Banking Company advance money to the Tanana Electric Company?

"A. Mr. Chilberg left an order to the effect; for the Fairbanks Banking Company to advance money from time to time to the Tanana Electric Company as they needed it, and that the Scandinavian-American Bank would transfer credits from time to time to take up the advances that were made by the Fairbanks Banking Company.

"Q. Just state what the Fairbanks Banking Company did in pursuance to that.

"A. As soon as Mr. Hutchinson was sent in here by Mr. Chilberg—He was manager of the Tanana Electric Company, and in installing this water plant and moving the machinery and the plant it took a great deal of money, and Mr. Hutchinson drew checks on the Fairbanks Banking Company on Fairbanks, also on their branch bank at Cleary, and, when this amount reached the sum of $18,500, the Fairbanks Banking Company telegraphed Mr. Chilberg or the Scandinavian-American Bank, and he wired back a credit for them. Then they kept on advancing this money until they had reached another sum of $25,000, and the bank wired them about that, and he wired

a credit for that. They then continued making these advances until the fall of 1907 when the amount reached approximately $30,000. At this time Mr. Richmond—or before this time in the fall, on the last boats, Mr. Richmond went to Seattle. He was manager of the Tanana Electric Company at that time. He told us before he left —I believe a note was executed by the Tanana Electric Company in favor of the Scandinavian-American Bank for the sum of $56,500, or it might have been more, but it was to take up the balance due on the mortgage, and credit was to be transferred from Seattle to the Fairbanks Banking Company. This amount reached $30,000, and, when Mr. Richmond arrived in Seattle, he wired to Mr. Wilson, who was the secretary of the Tanana Electric Company, that Chilberg was in New York, and that matters would be arranged upon his return. The bank then later on wired Mr. Chilberg that they had made these advances, and requested him to telegraph a credit. In answer to that, Chilberg wired back to advance nothing more to the Tanana Electric Company. In the meantime Chilberg, or the Scandinavian-American Bank, had advanced, as near as I can remember, to the Fairbanks Banking Company against this credit possibly ten or eleven thousand dollars (pp. 718-720).

"Q. Now, you went out in November, 1907?

"A. Yes. I went out in November, 1907.

"Q. What steps, if any, did you take toward securing the collection of this amount?

"A. Well, I went first to Mr. Wolfolk, who was assistant cashier of the Scandinavian-American Bank, and asked him if Mr. Chilberg had put through the credit to the Fairbanks Banking Company. He said no, he had not, but he expected he would; that advances had been made against

some drafts that had come in, and he said he was anxious to have the credit go through so he could know where the credit was, as drafts of the Fairbanks Banking Company were being presented to him and he didn't know what to do with them. I took the matter up with Mr. Chilberg, and he said that, owing to conditions that existed at that time, and the panic that was on, it was impossible for him to advance the credit at that time. He said that if I cared to, I could go before the board of directors of the Scandinavian-American Bank.

"Q. What did he say in regard to the payment, or knowledge of the payment?

"A. He simply said he was not in a position to pay it. *He never disputed the amount in any way.* And when I appeared before the directors of the Scandinavian-American Bank and told them all about it, they said: Everything is up in the air, and the Miners & Merchants Bank of Nome has drawn against us for $700,000, and this panic going on, we can't listen to any proposition of that kind at present.

"Q. Did you place the matter in the hands of an attorney there?

"A. Yes. We were anxious to have these outstanding drafts paid at that time, and I went to Kerr & McCord.

"Q. Did you lay the matter before them?

"A. Yes.

"Q. What did they advise you?

"A. Mr. McCord and I went down and had a talk with Chilberg in his office in the Scandinavian-American Bank, and the only satisfacton we could get out of them was that he was not in a position to pay the money. McCord said: 'The Fairbanks Banking Company needs this money to pay these drafts, and, unless you can pay them, we

will start suit tomorrow.' Chilberg didn't say anything, and we walked out of the office.

"Q. What did Mr. McCord, after you put the facts before him, advise you as to the probability of collecting this money?

"A. He said there would be absolutely no question of recovering it (pp. 720-722).

"Q. I will ask you whether or not in April, 1910, knowing the facts as you did, and the advice you received, you believed this was a good and valid claim existing against the Scandinavian-American Bank?

"A. I considered it just as good then as I did in 1908 (pp. 722-723).

Dr. W. G. Cassels was the Chairman of the Depositors' Committee which examined the assets of the Fairbanks Banking Company. He testified as follows:

"Q. Did you regard the note of the Tanana Electric Company which was examined by you and reported on, as of value?

"A. Not of value as regards the paper of the electric company, but a *letter was presented at that time* by the bank which convinced me that the advances to the electric company had been authorized by the Scandinavian-American Bank of Seattle, and it was really their credit that was in question.

"Q. By whom was this letter presented, Doctor?

"A. I believe that the letter was presented by Mr. Dusenbury, or Mr. Hill, but I believe by Mr. Hill—those were the only two that handled the papers.

"Q. Was any investigation made by your committee to determine the value of the Tanana Electric Company note?

"A. There was some discussion by the com-

mittee. It was, as I remember, referred to Mr. Claypool as the only attorney sitting at the board, and he believed that the letter or papers presented by the bank was sufficient to hold the Scandinavian-American Bank as security for the debt" (pp. 282-283).

From the foregoing testimony it is clear that if this testimony was true, there was a legal liability on the part of the Scandinavian-American Bank to pay the Tanana Electric Company notes; nor does it appear that the bank ever repudiated its liability to the Fairbanks Banking Company. At the time the financial panic occurred, when every bank in the United States went on a clearing house basis, the Scandinavian-American Bank was very much exercised at the situation. The records show a long letter from Mr. Chilberg to the Fairbanks Banking Company (p. 258), in which he describes the condition of affairs and then says:

"This situation compels an actual cessation of all loans or advances of any kind, *whether they have been arranged for before or not,* and it will necessitate the discontinuance of advances to the Tanana Electric Company on their mortgage" (p. 260).

The following day he telegraphed to the Fairbanks Banking Company,

"Advance nothing more Tanana Electric Company."

From the nature of the whole transaction, it is perfectly evident that the advances which the Fairbanks Banking Company was making, were being made on the faith of their repayment by the Scandinavian-American Bank. A course of business which had been established, had continued long enough to warrant a reliance upon its continuation, even had there been no written guaranty, and the guaranty was never repudiated. The very fact that the telegram from Chilberg on November 9th, 1907, said "Advance nothing further to Tanana Electric Company," was evidence that the advances previously made were made under his direction. The fact that the Scandinavian-American Bank was at that time a creditor of the Fairbanks Banking Company to the amount of over $10,000.00, which it made no effort to collect, showed that there was somewhere a knowledge on its part that it was not safe for it to demand this $10,000.00, for it would inevitably be met with the counter-demand for the $27,000.00.

At the time the Fairbanks Banking Company took over the assets of the partnership, all of these facts were gone into, as Dr. Cassels testified, and in the face of the knowledge of all of these conditions the depositors' committee appraised the notes at their face value. They were carried on the books at their face value at the time of the declaration of the dividend on April 12th, 1910. There was nothing fraudulent on the part of any of the directors in this. If in fact

there was a liability on the part of the Scandinavian-American Bank to pay this money, and the Scandinavian-American Bank was solvent, the Fairbanks Banking Company was entitled to carry this asset at its face value, even though convinced that the Scandinavian-American Bank would seek to evade the payment. What items are to be written off as worthless, what items are to be reduced as depreciated, and what items are to be carried at their full value, is very frequently a matter upon which experts may differ.

XII.

THE DIRECTORS DID AS A MATTER OF FACT ACTUALLY BELIEVE THE BANK WAS SOLVENT AND POSSESSED A SURPLUS ON APRIL 12, 1910, AT THE TI E THE DIVIDFND WAS DECLARED.

John A. Clark testified:

"Q. At the meeting of October 12, 1910, I will ask you whether there was a statement presented to the directors as to the condition of the bank on that day?

"A. My recollection is that there was, and I think a copy is filed in the minutes—filed with the minutes of that day.

"Q. I will ask you to state whether or not at that time you believed that the Fairbanks Banking Company was in good shape?

"A. I certainly did.

"Q. And solvent?

"A. I certainly considered it solvent at that time.

"Q. State whether or not you believed that its assets exceeded its liabilities, and included in its liabilities its capital stock?

"A. I did.

"Q. The condition of the Washington-Alaska Bank of October 11, 1910. State what that shows as to what the interest, exchange and undivided profits were at that time?

"A. It shows here $51,576.29.

"Q. From that statement, as a director what were you led to believe?

"A. I believed that that was the undivided profits and the interest and exchange.

"Q. I think it also says that that was in connection with some gold shipment?

"A. I think I understood it was in connection with profits that were anticipated on gold shipments, or something of that kind.

"Q. Did you believe at that time that these were the profits over the liabilities?

"A. Yes, sir" (pp. 892-893).

John L. McGinn testified:

"Q. Now, as to the condition of the bank April 12, 1910, I will ask you to state whether you believed the bank at that time to be solvent?

"A. Absolutely. Yes, sir.

"Q. I will ask you to state how you showed your confidence in that behalf?

"A. Well, I had about in the neighborhood of $64,000 on deposit there at that time.

"Q. Did you keep it on deposit there for some time afterwards?

"A. I kept it on deposit there until we purchased the First National Bank.

"Q. And prior to that time had you considerable sums on deposit?

"A. Yes, sir. I had more on deposit a short time before that.

"Q. More than $60,000?

"A. Yes. I have had thirty-four and thirty-five thousand dollars more.

"Q. Can you state from memory the names of those directors who had large sums on deposit at that time?

"A. Dave Yarnell had about $140,000, and the Jessons as I understood in the neighborhood of $88,000" (p. 927).

R. C. Wood testified:

"MR. McGINN—Q. How much did E. T. Barnette have on deposit at that time [April 12, 1910]?

"A. He had about $292,000.

"Q. Would that include his special deposit of $200,000?

"A. Yes, sir" (p. 728).

The evidence shows that Barnette, the Jessons, McGinn and Yarnell had on deposit at the time of the declaration of the dividend, deposits aggregating more than half the total deposits of the bank (p. 385).

XIII.

THE PLAINTIFF MUST SHOW THAT HE REPRESENTS CREDITORS, WHO WERE SUCH AT THE TIME THE DIVIDEND WAS DECLARED AND THE STOCK PURCHASED.

Defendants assigned as error the refusal of the Court to make the following finding:

> "That it has not been shown that the creditors who were existing at the time of the surrender of said stock and the cancellation thereon as hereinbefore set forth have not been paid in full by the Washington-Alaska Bank of Nevada, save and except that on July 1, 1908, were existing creditors, who have not since been paid in full, to the amount of $4,000, and of said sum one-half thereof has since been paid by the receiver" (Assignment No. 34).

This proposed finding is in accordance with the uncontradicted evidence of the witness Wood (p. 1048).

As a general rule, in case a corporation purchases its own stock, paying therefor with corporate assets, subsequent creditors cannot be regarded as prejudicially affected.

Pabst v. *Goodrich,* 133 Wis., 43; 113 N. W., 398, 14 Ann. Cas., 824;

Atlanta, etc. Ass'n. v. *Smith,* 141 Wis., 377, 123 N. W., 106, 135 A. S. R., 42, 32 L. R. A. (N. S.), 137;

Note: 17 Ann. Cas., 1263;

7 *Ruling Case Law.,* page 530.

It is a well-settled principle that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company from whom they claim the benefit occurred after the contract became an executed contract.

Porter v. *Pittsburg,* 120 U. S., 649;
Graham v. *Railroad Co.,* 102 U. S., 148;
Rollins v. *Shaver Wagon Co.,* 20 A. S. R., 428.

Even if the transaction is, in fact, fraudulent, creditors whose claims were created subsequently could not complain of it.

Fifield v. *Gaston,* 12 Ia., 221;
Whitescarver v. *Bonney,* 9 Ia., 484.

The complaint alleges the insolvency of the bank at the time the stock was taken over and the dividend paid, but it fails to state that at the said time there were any existing creditors of said bank, and fails to state that any then existing creditors of said bank have not been paid.

> "Creditors whose debts were contracted subsequent to the reduction (of capital stock) can only look to the capital stock as reduced, for security."

1 *Cook on Corporations,* 289.

and

> " 'Corporate creditors' who become such after the reduction of the capital stock has been made,

cannot complain that such reduction was irregularly made and that the holders of the cancelled stock are consequently still liable."

1 *Cook on Corporations,* 289;
Hepburn v. *Exchange,* 4 La. Ann., 87;
Palfrey v. *Paulding,* 7 La. Ann., 363;
Cooper v. *Fredericks,* 9th Ala., 738;
Re State Ins. Co., 14 Fed., 28;
Gade v. *Forrest,* 163 Ill., 367;
46 N. E., 286.

The rule that the property of a corporation is deemed a trust fund for creditors, is wholly a creation of the courts of equity, and only those having equitable rights in the fund at the time of its depletion have a right to resort to such fund to satisfy their claims. "Creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and are therefore not held to have an equitable claim therein."

Marvin v. *Anderson,* 87 N. W., 226.

The case of *McDonald* v. *Dewey,* decided by the Supreme Court of the United States and reported in 202 U. S., page 510, was a suit instituted by the receiver of the First National Bank of Orleans, Nebraska, to enforce an assessment of $86.00 a share on 105 shares of stock of said National Bank, the said

assessment having been made upon May 20th, 1897. It was claimed that Charles Dewey, who was the original owner of said 105 shares of stock, sold the same in 1894, at a time when the bank was insolvent, to a person whom he knew to be irresponsible, and it was claimed by the receiver that this was in fraud of the rights of creditors. The Court in this case laid down the rule, that in the event of the insolvency of the bank at the time said shares were transferred, it was only existing creditors who can claim to have been damnified by the fraudulent transfer of the shares, and as to them, such transfer is voidable. That subsequent creditors were apprised by the published report as to whom transfers had been made and of the persons to whom they had recourse for double liability. The Court saying:

> "the injustice of holding a stockholder liable for an indefinite time in the future, to creditors who may have become such years after he had parted with the stock, and who were apprised of the *name of the stockholder by the published list,* is too manifest to require an extended comment. We are only applying to this case by analogy, the ordinary rule of common law that a voluntary deed by a person heavily indebted, is fraudulent and void as to prior creditors merely upon the ground that he was so indebted, but that as to subsequent creditors is only void upon the evidence that the deed was made in contemplation of future indebtedness."

And the Court at the end of the opinion says:

"There are undoubtedly cases in which we have used the general expression that in the event of a fraudulent transfer of stock, the stockholders remain liable to the creditors of the bank, but in none of them were we called upon to discriminate between existing and subsequent creditors, since the rule of the insolvency of the bank followed soon after the transfer, and the distinction was not called to our attention by counsel."

It is provided by the Alaska law:

"Sec. 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any State or Territory of the United States, shall, before doing business within the District, file in the office of the secretary of the District and in the office of the clerk of the district court for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

"(1) The name of such corporation and the location of its principal office or place of business without the District; and, if it is to have any place of business or principal office within the District, the location thereof;

"(2) *The amount of capital stock;*

"(3) *The amount of its capital stock actually paid in in money;*

"(4) *The amount of its capital stock paid in in any other way, and in what;*

"(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

"(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property."

Compiled Laws of Alaska (C. C.), Sec. 654, p. 329;
Carter Code, Sec. 255.

And it is further provided by Section 658 of the compiled laws (*Carter Code,* Sec. 229) that a similar statement shall be filed annually.

The evidence shows that from time to time as required by the foregoing law the bank filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, statements showing the amount of the outstanding capital stock of said corporation.

The defendants requested findings upon this subject (Assignments 38, 39 and 40).

These statements were notice to the creditors of any reduction of the capital stock which had been made.

There must be some purpose which the law intended to be subserved by requiring foreign corporations to publish the amount of their outstanding stock and it can be nothing other than that persons contemplating becoming creditors of the corporation may know to what assets they may have recourse.

Any person becoming a creditor after any surrender

of stock took place, had certainly no right to complain because any fund to which he might deem himself entitled to look was depleted. And this would be more emphatically the case when public notice had been given as required by law of the fact that such depletion had taken place.

It is manifest from the authorities and also upon principle, that the trust fund doctrine created by the courts of equity can only apply to existing creditors. As stated in *Marvin* v. *Anderson,* creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and so therefore, we think it clear that only existing creditors can complain.

XIII.

THE TRANSACTION BETWEEN THE BARNETTES AND THE RECEIVERS AMOUNTED TO AN ACCORD AND SATISFACTION, AND RELEASED THE DEFENDANTS AS JOINT-TORT-FEASORS OF BARNETTE.

Let us first review the facts in this connection:

On the 13th day of March, 1911, E. T. Barnette and Isabelle Barnette presented a petition to the judge of the court below, which we set forth in brief (p. 939):

> 1. That Barnette was, and for a long time past has been, the President of the Washington-Alaska

Bank; That said bank became involved in financial difficulties and was compelled to close its doors on the 3rd day of January, 1911. That at such time it was, and is now, unable to pay its depositors in full, and that its affairs are now in the hands of F. W. Hawkins and E. H. Mack, receivers.

2. That E. T. Barnette desires to become surety to the depositors of said Washington-Alaska Bank, and is possessed of real estate; that Isabelle Barnette, in consideration of love and affection for her husband E. T. Barnette, desires to aid her husband in "making payment to said depositors of said Washington-Alaska Bank," and is possessed of real estate and lands.

3. That said E. T. Barnette and Isabelle Barnette each desire to grant and convey unto the receivers said real estate and lands, to be held by the receivers as *security for the payment to said depositors of all sums of money which are now due, owing and payable to said depositors,* and to that end and for that purpose, do hereby deliver into court certain trust deeds of said real estate and lands, to be held by said receivers as security for payment in full to said depositors.

4. That they desire that the said receivers shall hold said real estate and lands in trust as security for payment to said depositors of all monies that shall be found due said depositors after the affairs of the Washington-Alaska Bank shall have been wound up and the assets of said bank realized upon and paid over to such persons; such trusteeship to continue until the 18th day of November, 1914; provided, that E. T. and Isabelle Barnette shall have failed to pay to said depositors any de-

ficiency that may be found to exist after winding up the affairs of said bank; it being the intention, desire and express wish of said petitioners, and each of them, and they agree and each of them do hereby promise and agree, to pay the said depositors in full not later than the said 18 day of November, 1914.

Then follow provisions in regard to the rents, issues and profits of said real estate, to the effect that the receivers shall collect the same, and, after deducting reasonable charges for collecting the same, taxes, etc., then "that the same be paid *pro rata* to said depositors," at such time and in such manner as the Court may direct.

It is then provided that if the petitioners and receivers deem it more advisable, after the delivery of said trust deeds, to sell and dispose of the lands situate in Alaska than to retain the same, that the same may be sold, and the proceeds disposed of, the same as the rents, issues and profits as above set forth.

Then follow representations as to the title, both as to the Alaska property and the Mexican property, to the effect that the same is all clear, except a certain option in favor of Ward and Beggs dated November 18, 1909, a copy of which was filed with the petition.

It then sets forth that certain legal proceedings are contemplated and about to be commenced against Barnette, which said legal proceedings would subject said real estate and lands (in Alaska)

(a) To the orders and processes of this court,

(b) Prevent your petitioners in any manner dealing in or with, or disposing thereof,

(c) Would entail great and unnecessary expense.

(Said litigation relating to Barnette's connection with the Washington-Alaska Bank.)

and that the petitioners desire to:

(a) Prevent the commencement of legal proceedings,

(b) And the incurring of said unnecessary and great expenses

(c) By surrendering all real estate and lands of said petitioners to the receivers, in trust.

(d) By paying all depositors of said Washington-Alaska Bank in full their respective deposits, with interest, not later than November 18, 1914.

The petitioners then pray that an order be made directing the receivers:

1: To accept and hold in trust the deeds to real estate and lands for the time and in the manner as herein provided.

2: To collect rents, etc., and disburse the same;

3: That if depositors are not paid in full, including interest by November 18, 1914, that the

receivers shall sell and dispose of all the real estate and property for the best price obtainable, and the proceeds be applied,

(a) In payment of depositors, with interest,

(b) Residue delivered to E. T. Barnette and Isabelle Barnette.

Trust deeds for property located in Alaska and in Mexico were presented with said petition.

On the 14th day of March, 1911, the said petition came on for hearing, and the Court, after hearing said petition, and "it appearing that it is a matter which should originate with the receivers," it is ordered "that said petition of E. T. Barnette and Isa-" belle Barnette, his wife, and the papers pertaining " thereto, be turned over to the receivers of the Wash-" ington-Alaska Bank for their consideration."

On the 20th day of March, 1911, there was filed with the clerk of this court, an "application of receivers for instructions," the same being dated March 20, 1911, wherein the receivers represent to the Court that "on the 18th day of March, 1911, E. T. Barnette " and Isabelle Barnette, his wife, delivered to us two " trust deeds, properly executed, wherein we are namd " as trustees of certain lands (mentioning them), *said* " *deeds being in trust on the terms and conditions* " *therein specified;* the object and purpose being as " therein expressed, to secure and ultimately pay the

" depositors and owners of unpaid drafts any balance " that may remain after the property and assets of " said bank are collected and applied in payment " thereof."

The receivers further say in said application: *"We " are of the opinion that if these deeds are accepted, " it will be* IMPRACTICABLE TO PROCEED AS CONTEM- " PLATED TO FIX THE LIABILITY AGAINST E. T. BAR- " NETTE, ONE OF THE GRANTORS, IN FAVOR OF THE " CREDITORS OF SAID BANK BY ACTIONS IN COURT HERE, " . . . In view of the *premises* we ask for the in- " structions and directions of the Court as to whether " we shall accept the said trust deeds and undertake " the duties and responsibilities entailed upon us " thereby, or return the same to the grantors thereof."

Said trust deeds were submitted with said application for instructions.

On the 29th day of March, 1911, the judge of the court made an order based on said "Application of receivers for instructions," directing said receivers to "accept said deeds" . . . and that said receivers take the proper and necessary steps and action to secure the same and the proceeds and issues therefrom to the payment of the liabilities of the Washington-Alaska Bank, in connection with their duties as receivers in the above entitled action.

The contents of the deeds that were presented with said "application for instructions" and which the re-

ceivers were directed by the order of the Court to accept may be digested as follows:

1. Bank suspended January 5, 1911, and at said time was, and now is, unable to pay in full all its depositors and other creditors the owners and holders of unpaid drafts; and that the property and assets of said bank are now in the hands of the receivers.

2. Barnette was the president and a director; that Isabelle Barnette "desirous to assist her husband in securing the payment of, and in paying and discharging, the obligations of her said husband to the depositors and holders of unpaid drafts."

3. Receivers are about to commence an action for and on behalf of *creditors* . . . against E. T. Barnette to recover from him the amount of any deficiency that may be ascertained as between the claims of the creditors above mentioned and the amount realized out of the property and the assets of said bank; said actions to be based on the liability of said E. T. Barnette to said creditors, arising out of his management of the affairs thereof.

Now, therefore, in consideration of the premises, viz.:

(1) Bank unable to pay depositors and holders of unpaid drafts.

(2) Desire of Mrs. Barnette to assist her husband in securing the payment of, and in paying and discharging the obligations of her husband.

(3) Receivers about to commence an action against E. T. Barnette to recover deficiency between claims of creditors and the amount realized out of the assets, on account of liability of E. T. Barnette arising out of his management from March, 1908, to January 4, 1911.

(4) Which said litigation, as appears from petition of E. T. Barnette and Isabelle Barnette, would subject the real estate and lands in Alaska,

(a) To orders and processes of this court,

(b) To prevent your petitioners in any way dealing in or with or disposing thereof.

(c) Would entail great and unnecessary expense.

and of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank, growing out of his connection with the management of the business affairs thereof as President and one of the directors, and other good and sufficient considerations, said first parties do hereby grant and convey to the second parties in trust for the uses and purposes thereinafter specified, all the right, title and interest, etc., (describing the real estate and lands). To have and to hold . . . upon the following terms and conditions:

1. Whereas bank, on March 18, 1908, commenced to transact a general banking business, and operated bank until January 5, 1911.

2. During all of which time Barnette was President and a director, and as such was active

and influential in the control and management of its business affairs.

3. That on or about the 5th of January, 1911, bank became insolvent and receivers appointed.

4. That it has at all times since appeared, and now is apparent, that there is and will be a large deficiency as between the obligations of said bank to—

(a) Its depositors,

(b) Owners of unpaid drafts; On one side, and the Proceeds of its property and assets on the other.

5. That by reason of all of the premises, namely—

(a) Inability to pay depositors and holders of unpaid drafts,

(b) Receiver about to commence an action to recover deficiency between claims of creditors and the amounts realized out of assets on account of liability of Barnette to the creditors arising out of his management of bank.

(c) Insolvency of bank.

(d) That it is apparent that there will be a large deficiency between the obligations to depositors and holders of unpaid drafts and the amount realized from the property and assets.,

said E. T. Barnette heretofore assumed, and does now assume and take upon himself the obligations—

(a) To pay the depositors and owners of unpaid drafts and their representatives, any deficit

> that may hereafter be ascertained as between the amounts due to such depositors and owners of unpaid drafts from said banking institution on January 5, 1911, together with 6 per cent. interest thereon from January 5, 1911, *and the amount realized out of the property and assets of said bank and paid to such creditors.* That the amount of such deficiency is not known at this time, but will be ascertained on or before November 18, 1914.

(The clear interpretation of this language is that Barnette assumes to pay any deficiency between the amount due depositors and holders of unpaid drafts, and the amounts realized out of the property and assets of said bank and paid to such creditors by November 18, 1914.)

Said deeds then provide that the receivers take possession of the Alaska property, manage, control, etc., the same, return to the court the net amounts of the rents, issues and profits, and the same to be disbursed by the Court through its receivers *pro rata* to said depositors and holders of unpaid drafts; and also that if at any time after delivery of the deed, it is deemed advantageous by all of the parties, that the Alaska property be sold. The receivers may sell the same, and the proceeds may be disbursed by the Court *pro rata* to the depositors and owners of unpaid drafts.

> It is then provided, But that if on November 18, 1914, demands of depositors and owners of

unpaid drafts, with interest, have not been fully paid and satisfied, either—

1: Out of the property and assets of said bank as administered by the receivers,

2: Or otherwise,

3: Or by E. T. Barnette.

The Receivers

(1) may and are hereby empowered to sell (the same) at private sale, the whole or part of the real estate then unsold, upon the best terms that they may be able to secure,

(2) make proper conveyances therefor,

(3) receive the purchase price and turn the same into court and pay out so much thereof as may be needed to fully liquidate and pay *any balance that may remain unpaid of the claims and demands of the depositors and owners of unpaid drafts.*

said money to be disposed of by order of the court; If there be more of the purchase money than is required to pay and discharge the said balance due to the depositors and owners of unpaid drafts . . . overplus shall be returned to party of first part

Covenants of title.

And the statement that if, at any time, after delivery of deeds, the demands of depositors and owners of drafts shall be satisfied in full, the receivers shall re-convey said property to E. T. and Isabelle Barnette.

It is then provided that it is understood and agreed that if after—

1: Applying the proceeds of the property and assets of said Washington-Alaska Bank,

2: the amount collected by receiver from George Edgar Ward and W. B. Beggs, if any,

3: and the proceeds of the sale of property situate in Alaska,

4: and the amounts collected and received, if any, by receivers from the rents, issues and sales of the real property conveyed by the trust deeds.

there should remain a balance yet due depositors and owners of unpaid drafts, then the first parties hereby . . . promise and agree to make good such balance or deficiency and pay same to second parties on demand.

The provisions of the deeds for the Alaska property and the Mexican property are practically the same, with the exception that as to the Alaska property the receivers were to take immediate possession, but were not to take possession of the Mexican property until November 18, 1914.

The receivers, after said order of Court, accepted the delivery of said trust deeds and took possession of the property situate in the Fairbanks Recording District, Alaska, and since said time have received the rents, royalties and issues derived therefrom, and in one instance, with the consent of Barnette, sold some property on Second Avenue in the town of

Fairbanks, Alaska, for which they received the sum of $2500 (p. 1011).

The net amount realized from the rents, issues, profits and sale of said property up to May 1, 1914, netted the sum of $30,905.65 (p. 963).

The evidence undisputed shows the value of the Barnette property situate on Turner Street, is between $20,000 and $25,000 (pp. 1009, 1010), that the Barnette home is of the value of $3500 (p. 1009); showing that it may safely be assumed that the town property is worth the sum of $25,000.

The evidence shows that the interests of the receivers, under the trust deed, in the mining property situate on Dome and Vault Creeks, is of the value of $20,000 (p. 1018).

The present value of the Mexican property is unknown, but, at the time of the execution of the trust deeds, was of the value of $500,000 (p. 959).

Our contention is:

1. That the acceptance of the deeds of trust by the receivers under order of the Court, upon the terms therein mentioned constituted a complete accord and satisfaction of all the liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank, and thereby operated as a satisfaction and extinguishment of the original causes of action against E. T. Barnette;

thereby releasing all persons jointly liable with him.

2. That if said acts,—and the delivery of said trust deeds, and the acceptance of the same by the receivers, did not operate as an accord and satisfaction, that it was as to him at least, a covenant not to sue, and as such operated to extinguish the original causes of action to the amount of the value of the money and property received thereby.

3. That the same constituted the compromise of a tort; the same being disputed by the said E. T. Barnette, the amount for which he was liable and the certainty of his liability being questionable.

It is, of course, well settled that an accord and satisfaction by one joint-tort-feasor, operates as a release of all.

The rule is thus stated in 1 *Ruling Case Law*, page 201:

> "The general rule that the discharge of one joint debtor discharges his co-joint debtors is applicable to a discharge of one joint debtor by way of accord and satisfaction. So as a general rule, an accord and satisfaction between a person injured and one of several co-tortfeasors responsible therefor will discharge the others from further liability to the person injured."

This accord and satisfaction may be effected by the substitution of a new obligation notwithstanding the latter is executory.

In a leading case, the Supreme Court of Iowa said:

> "The common law declares that, without a satisfaction, an accord is no bar to a suit upon the original obligation. If, however, the accord is founded upon a new consideration, and accepted as satisfaction, it operates as such satisfaction, and will be held to take away the remedy upon the old contract. This we believe to be in accordance with the current of authorities, and is certainly in harmony with the analogies and equities of the law. *Story Cont.*, Sec. 982; *Pars. Cont.*, 194 *et seq.* Whether there has been a new consideration in legal contemplation, and particularly whether the accord or (new) agreement was accepted as satisfaction, depends upon the circumstances of each case; and in determining its tenor and effect, we must, from the circumstances, endeavor to ascertain the intention of the parties. For while some authors and some of the cases speak of the unexecuted promise being satisfaction in those cases only where it is made so by express agreement, we suppose that ordinarily no rule is violated in holding that it is sufficient, if this intention or purpose is evidenced by any unequivocal act, or in any clear manner. It was said in examining a somewhat similar proposition in *Levi* v. *Karrick*, 13 Iowa, 344: 'The question is one of evidence or contract, and whether . . . established by necessary implication, or from express stipulation, the rule is the same.' "

Hall v. *Smith*, 15 Iowa, 583.

While it is a general rule that an accord, in order to operate as a discharge of the debt, must be executed, yet it is equally well established that where the creditor accepts the mere promise of the debtor to perform some acts in the future in satisfaction of the debt, the mere promise itself without satisfaction is sufficient to extinguish the debt:

Smith v. *Elrod,* 122 Ala., 269, 24 South., 994;
Price v. *Price,* 111 Ky., 771, 64 S. W., 746; 66 S. W., 529;
Gowing v. *Thomas,* 67 N. H., 399, 40 Atl., 184;
Billings v. *Vanderbeck,* 23 Barb., 546;
Nassoiy v. *Tomlinson,* 148 N. Y., 326, 51 Am. St. Rep., 695, 42 N. E., 715.

The same rule is substantially asserted in

Guldagar v. *Rockwell,* 14 Colo., 459, 24 Pac., 556;
Goodrich v. *Stanley,* 24 Conn., 613;
Sanford v. *Abrams,* 24 Fla., 181, 2 South., 273;
Brunswick, etc. R. R. Co. v. *Clem,* 80 Ga., 534, 7 S. E., 84;
Knowles v. *Knowles,* 128 Ill., 110, 21 N. E., 196;
Moon v. *Martin,* 122 Ind., 211, 23 N. E., 668;
Potts v. *Polk County,* 80 Iowa, 401, 45 N. W., 775;
Peace v. *Stennet,* 4 J. J. Marsh, 450;

White v. *Gray,* 68 Me., 579;
Yazoo, etc. R. R. Co. v. *Fulton,* 71 Miss., 385, 14 South., 271;
Todd v. *Terry,* 26 Mo. App., 598;
Frick v. *Joseph,* 2 N. Mex., 138;
Oregon, etc. R. R. Co. v. *Forrest,* 128 N. Y., 83, 28 N. E., 137;
Christie v. *Craige,* 20 Pa. St., 430;
Gulf, etc. R. v. *Harriett,* 80 Tex., 73, 15 S. W., 556;
Babcock v. *Hawkins,* 23 Vt., 561.

There may be a complete accord and satisfaction notwithstanding that there has not been complete performance.

In *Hosler* v. *Hursh,* 151 Pa. St., 415, 25 Atl., 52, Mr. Justice Sterrett says:

> "It is no doubt true as was held in *Babcock* v. *Hawkins,* 23 Vt., 561, cited by the learned president of the common pleas, that where the accord is founded upon a new consideration and is accepted as satisfaction, it operates as such, and bars the remedy on the old contract. There is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. *If the promise itself and not its performance is accepted in satisfaction* this is a good accord and satisfaction without performance."

This doctrine is approved in

Laughead v. *Frick Coke Co.,* 103 Am. St. Rep., 1017.

The law bearing upon this issue is very clearly stated in *Chitty on Contracts:*

> "Upon the whole, the true distinction would seem to be between the cases in which the plaintiff has agreed to accept the promise of the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction; the rule being that, in the latter case, there shall be no satisfaction without performance, while in the former, if the promise be not performed, the plaintiff's only remedy is by action for the breach thereof, and he has no right to recur to the original demand."

Gulf C. & S. F. Ry. Co. v. *Harriett,* 15 S. W., 557.

WHETHER IT IS THE NEW PROMISE OR THE PERFORMANCE THEREOF WHICH IS TO CONSTITUTE SATISFACTION DEPENDS ENTIRELY UPON THE INTENTION OF THE PARTIES.

Mr. Parsons says, that a promise without execution is no satisfaction unless by express agreement it had this effect. And again, it is said that the promisee may sue on the original cause of action, unless by the tenor or the legal effect of the new contract,

the new promise is itself a satisfaction and an extinction of the old one.

2 *Parsons on Cont.,* 194, 196, 199, note s.

"It," says Redfield, J., in *Babcock* v. *Hawkins,* 23 Ver., 561, "is ordinarily a question of inten-" tion, and should be evidenced by some express " agreement to that effect, or by some unequivocal act " evidencing such a purpose." In that case this intent was shown by executing a receipt in full to settle all book accounts to that date, including that sued on. So in arriving at the intention courts will ascertain whether the second agreement is founded upon a new consideration, whether the promisee has surrendered or retained the evidence upon which to maintain his former remedy, whether any securities have been given up, whether a release or receipt has been executed, whether the new contract is of a higher grade than the old. These and similar considerations are to have weight in determining the intention of the parties.

Hall v. *Smith et al.,* 10 Ia., 49;
Walker v. *Metcalf,* 58 Atl., 687.

Whether an accord or new agreement has been accepted as satisfaction depends upon the circum-

stances of each case, and must be ascertained from the intention of the parties as evidenced by their acts.

Hall v. *Smith,* 10 Ia., 45, 45 Iowa, 588;
Curtis v. *Browne,* 63 Mo. App., 438;
Worden v. *Houston,* 92 Mo. App., 371;
Frick v. *Joseph,* 2 N. Mex., 138;
McCreery v. *Day,* 119 N. Y., 5, 23 N. E. Rep., 198;
Laughead v. *H. C. Frick Coke Co.,* 209 Pa. St., 368, 58 Atl. Rep., 685;
Evans v. *Powis,* 1 Exch., 601;
Bullen v. *McGillicuddy,* 2 Dana (Ky.), 90;
Hart v. *Boller,* 15 S. & R. (Pa.), 162;
Gulf, etc. Ry. Co. v. *Harriett,* 80 Tex., 73, 15 S. W. Rep., 556;
Note to *Manley* v. *Vermont Mut. Fire Ins. Co.,* 6 A. & E. Ann. Cas., 563.

We must therefore examine the facts surrounding this transaction to arrive at the intention of the parties.

When this arrangement was carried into effect what was the situation of the parties? Could the receivers have receded from their position and sued Barnette on the original cause of action? Or were they estopped so to do? Was the transaction binding on Isabelle Barnette? If so, there must have been a consideration moving to her.

If there was no consideration for the execution

of these deeds the Barnettes are entitled to set the transfers aside.

If there was a consideration, what was that consideration? Plainly it was a forbearance on the part of the receivers to bring suit against Barnette. Whether there was such an agreement on the part of the receivers not to bring suit, must be ascertained from the circumstances of the transaction.

The following facts are apparent: 1st, that the receivers did not bring suit; 2nd, that in their petition to the Court they stated that it would be impracticable for them to bring suit if they accepted the deeds; 3rd, in their reply they expressly set up a promise not to sue.

Therefore, in consideration of their promise not to sue Barnette they secured these trust deeds containing not only property of Barnette which they could have subjected possibly to execution, but property of Isabelle Barnette, who was a stranger to the entire proceeding.

If this new promise which Barnette made and in which his wife joined, to pay the amounts due the depositors and draft holders, supported by the conveyance of their properties, was founded upon a valid consideration, then there was a complete accord and satisfaction.

The promise not to sue which was the consideration

for the deeds appears from the reply of the receiver in the following words:

> "As to whether or not the former receivers, after the delivery of said trust deeds, abandoned all idea of instituting a suit against said Barnette or any other director of said bank, this plaintiff has neither knowledge nor information sufficient to form a belief. He admits that no suit was instituted by them, as stated, and that no suit was instituted against said directors until after the appointment of the present receiver, this plaintiff. He alleges that in the institution and prosecution of this suit he is acting under order of court; he admits that the said Barnette was not joined as a party defendant in this action, and he alleges that the reason therefor is that *the acceptance of said trust deeds operated as an agreement not to sue said Barnette prior to November 18, 1914*" (p. 186).

An agreement not to sue. On what? On November 18, 1914, the receiver would have the right under the terms of the trust deeds to sue Barnette on his express written promise

> "to pay the depositors and owners of unpaid drafts of the said banking institution . . . any deficit that may be ascertained . . . by or before Nov. 18, 1914" (p. 1043).

The right to sue for the original tort was gone.

The word *"impracticable"* is thus defined by the Standard Dictionary:—"incapable of being affected "from lack of adequate means; impossible of per- "formance; not feasible; impossible; that which is

" impossible cannot be done at all; that which is im-
" practicable is theoretically impossible and cannot be
" done under existing conditions."

When the receivers stated to the Court that it would be impracticable to bring suit if they accepted the trust deeds, they meant it would be impossible for them to do so. Because they considered that the acceptance of the deeds of trust by them precluded any further action by them on account of the original torts.

They evidently regarded the transaction as accord and satisfaction so far as Barnette was concerned.

It is frequently stated that a covenant not to sue one tort-feasor, is no bar to an action against the other tort-feasors. This doctrine is undoubtedly sound, but the covenant not to sue, or the promise not to sue, may be the consideration for a new agreement by one of the tort-feasors, which agreement operating as a substitution for his original liability constitutes an accord, and where the understanding is that the promise embodied in the new agreement by the tort-feasor, and not the performance of the promise is intended as a satisfaction, then the accord and satisfaction is complete, and the other tort-feasors are released. The whole matter turns upon the question of whether the transaction between the Barnettes and the receivers was such that in any future event Barnette could have been sued by the receivers on the original causes of action. Suppose Barnette had

been made a party defendant to this action, his defense would have been: "I have compromised my "liability, have entered into a written agreement to "pay the amount for which I am liable, have con- "veyed property to the receivers in support of my "promise, and have caused my wife to join me in "this contract, and to add her property to mine as "security for its performance; there has been a "novation as between the receivers and myself. I "did this to avoid this very suit." This would have been a complete defense on Barnette's part, had he been made a defendant in this action. There can be no question about that.

Now the receiver admits that there was an agreement on his part not to sue Barnette. The significance of this so-called covenant not to sue, lies in the admission that there was a definite promise of forebearance to sue on the part of the receiver. The significance of this promise lies in the fact that it furnished the consideration for the engagements on the part of Barnette and his wife, and for the conveyance of their property, particularly that of Mrs. Barnette, and thereby placed them in such a position that they could not recede from their contract on the ground of want of consideration. They being thus bound under the new contract, and having no right to avoid it, the novation is complete, and this novation operated a complete accord and satisfaction.

XIV.

THE TRANSFER OF ASSETS TO THE PLAINTIFF BY BARNETTE WAS PRO TANTO A SATISFACTION OF ANY CLAIM BY THE RECEIVER AGAINST HIS JOINT-TORTFEASORS, AND THE PROPERTY SO TRANSFERRED BEING IN EXCESS OF THE AMOUNTS FOUND TO BE DUE FROM ANY OF THE DEFENDANTS, THEY HAVE BEEN THEREBY COMPLETELY DISCHARGED.

These defendants, if liable at all, were liable jointly with E. T. Barnette, who was their co-director at the time of the commission of all the torts complained of. His liability and responsibility for these acts was admitted in writing by him (pp. 1029-1032). To secure the depositors and creditors against loss and prevent litigation against himself, he and his wife executed deeds of trust to the receivers, which covered properties in Alaska consisting of town property and mining properties, and property in Mexico consisting of a large plantation, together in excess of the value of $600,000. The receivers went into immediate possession of the Alaska properties and realized from them more than enough to have satisfied the claims against these defendants (p. 953). They collected the sum of $30,905.65 in cash, which was in the present receiver's hands at the time of the trial. He was also in possession under the Barnette deed of property in Fairbanks which the undisputed testimony shows was worth $20,000 at least (pp. 1009, 1010).

So that without counting the mining properties or the Mexican, the receiver had in his possession at the time of the trial over $50,000 worth of property which he was entitled to apply in partial satisfaction of Barnette's liability.

That being the case the defendants were likewise entitled to the benefit of the application *pro tanto* to the claims for which they were jointly liable with Barnette, and the claims against them being smaller than the amounts paid by their joint-tort-feasor they have been in effect fully satisfied.

The avowed purpose of these conveyances to the receivers was to put them into possession of assets sufficient to pay off all of the indebtedness of the bank.

Can one tort-feasor compromise the tort by agreement to pay the damage in full, convey to the injured party property ample for the purpose, and at the same time leave it so that the party injured can bring his action against the co-tort-feasor as if the compromise had never been effected?

The rule is, of course, well settled that the release of one joint-tort-feasor operates as a release of all of them. It is likewise also well settled that a partial satisfaction of the claim by one joint-tort-feasor operates as a satisfaction *pro tanto* as to all the others. Satisfaction does not require that there should be an actual or formal release. It is sufficient if the injured party accepts something from one of the tort-feasors in lieu of his claim against such tort-feasor;

this amounts to a settlement, satisfaction and release of such tort-feasor, and the other joint-tort-feasors are then released thereby. This release may take place by means of an accord and satisfaction, and this accord and satisfaction may be likewise by way of a novation.

The plaintiff had originally certain claims against E. T. Barnette and various of the defendants here. These claims did not all arise out of the same transaction. There was a joint liability between Barnette, McGinn, Wood, Brumbaugh and Jesson, growing out of the declaration of a dividend; there was a joint liability between Barnette and Jesson, growing out of certain surrenders of stock; there was a joint liability between Barnette, Jesson and Hill, growing out of certain other releases of stock, and so on. Barnette and Jesson were the only ones who had a common liability with all the defendants for all of the injuries complained of in this case. Anything which the plaintiff did which operated to release Barnette in whole or in part, to that extent released the defendants herein.

Barnette in whole or partial settlement of his liabilities to the plaintiff, growing in part out of the transactions herein complained of, has transferred to the plaintiff property far in excess in value of the amount for which these defendants, or any of them, have been found liable. Admitting for the sake of argument that Barnette has not by these transactions

been totally released from his liabilities, and likewise admitting for the sake of argument that the new obligation assumed by him was not intended as a substitution for the original liability, the fact, nevertheless, appears that by means of money and property, which he has transferred to the plaintiff, he has reduced his liability to some extent. The defendants are entitled to the benefit of this settlement to the same extent; and it appearing that the property so transferred is of greater value than the amount for which they have been found liable, they are thereby fully released.

To illustrate, let us assume that four persons have committed a trespass upon a fifth, who instead of bringing a single action against the four jointly, brings four actions, one against each one. In one action he recovers a judgment of $100.00 against A; in another $500.00 against B; in the third $1000.00 against C, and in the fourth $5000.00 against D. Under the law he is at liberty to proceed by execution under any one of these judgments. If he proceeds under the $100.00 judgment and satisfies it, he satisfies all the others. If he proceeds under the $500.00 judgment and satisfies it, he satisfies all of the others. Suppose, however, that he proceeds under the $5000.00 judgment and realizes under execution $750.00, which he applies upon the judgment, the judgments against A and B are satisfied in full; against C as to all, except $250.00, while D still owes him $4250.00.

Chief Justice Kent in *Livingston* v. *Bishop,* 1 Johnson, 290, 3 Am. Decs., 330, said:

> "It is, however, a proposotion that is not controverted, but everywhere admitted, that for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried, may be used by way of *puis darrein* continuance, to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis,* and issue his execution accordingly."

Ellis v. *Esson,* 36 Am. Rep., 834, is a leading case. In that case the Court said:

> "It is insisted by the counsel for the respondent that when the contract which is set up as a release of one of several joint wrongdoers is not a technical release, the construction of which is fixed by the law, then the intention of the parties is to govern; and if it be clear that there was no intention on the part of the injured person to release his cause of action against all the wrong-doers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties, then any agreement of the injured party not to prosecute one or more of several wrong-doers, in consideration of the payment of a

specified sum of money, does not discharge the other wrong-doers, *except to the extent of the money so received.* In other words, when the contract is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the court or jury whether what he has received of the one wrong-doer was received in full satisfaction of his wrong; and if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrong-doers. And this view of the case, we think, is sustained by the great weight of authority *in all cases where the amount of the damages is the subject of proof and computation,* as in this case, though there is some conflict in those cases where the damages are not the subject of proof and computation, but rest mostly in the discretion of the jury, as in cases of assault and battery, slander, libel, false imprisonment and other actions of that nature."

In *Ellis* v. *Bitzer,* 2 Oh., 89, 15 Am. Dec., 537, it was said:

"An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all; they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction, but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for one hundred and fifty dollars, and to forbear to sue them; the note was given, and it was understood they were fully discharged, and

he has thus made his election, not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, *but also of the persons from whom he would recover that recompense.* He has been satisfied for the trespass committed upon him, and to permit him to recover in this action would give him another recompense for an injury already satisfied."

In the case of *Snow* v. *Chandler,* 10 N. H., 92, 34 Am. Dec., 141, the Court said:

"No release of damages was here given; and the only question is, whether the sum paid was in satisfaction of the damage incurred. If it was not so received, it is clear that the claim is not discharged. . . .

"It is clear that the sum paid was not received in satisfaction of the damage, but only in part satisfaction; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a partial satisfaction of the damage, and the plaintiff may sue or omit to suit whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such an arrangement. He remains liable for the whole damage until satisfaction is made.

"If the individual receiving the injury sees fit to visit the penalty upon any one guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. *At the same time, any partial payment by a co-trespasser avails so far for his benefit."*

Where, upon a settlement with one tort-feasor, plaintiff expressly reserves his cause of action against the other, if he has not been fully satisfied for the wrong done him, the wrong-doers can insist that whatever their co-trespassers have done towards *payment of the damages shall apply pro tanto,* and they are liable for the balance.

Chamberlin v. *Murphy,* 41 Vt., 110.

When the plaintiff has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury; but he is not so affected until he has received full satisfaction, or that which the law considers such. If he receives part of the damages from one of the wrong-doers, the receipt thereof not being understood to be in full satisfaction of the injury, he does not thereby discharge the others from liability:

Boyles v. *Knight,* 123 Ala., 289, 26 South., 939;
Heimaman v. *Kinnare,* 92 Ill. App., 232;
McGrillis v. *Hawes,* 38 Me., 566;
Irvine v. *Mulbank,* 15 Abb. Pr. (N. S.), 378;
Bloss v. *Plymale,* 3 W. Va., 393, 100 Am. Dec., 752;
Ellis v. *Esson,* 50 Wis., 138, 36 Am. Rep., 830, 6 N. W., 518.

Such partial satisfaction operates only as a satisfaction pro tanto in favor of the rest of the tort-

feasors. Thus far, however, they may show it in mitigation of damages, and they can be made to respond only for the balance:

Smith v. *Gayle,* 58 Ala., 600;
Meixell v. *Kirkpatrick,* 29 Kan., 679, 684;
Snow v. *Chandler,* 10 N. H., 92, 34 Am. Dec., 140;
Merchants Bank v. *Curtis,* 37 Barb., 317;
Knapp v. *Roche,* 94 N. Y., 329;
Heyer Bros. v. *Carr,* 6 R. I., 45;
Chamberlin v. *Murphy,* 41 Vt., 110.

For example, when a portion of property wrongfully taken is returned and accepted, there is a reduction *pro tanto* from the total damages that otherwise would be allowed:

Bowman v. *Davis,* 13 Colo., 297, 22 Pac., 507.

And where one is injured in a collision between the cars of a railroad and a street-car company, and the latter pays him five hundred dollars, in addition to compensating him for lost time, paying his doctor's bill, and the like, he is not precluded from recovering from the railroad company, provided he has executed no release, *though the amount received must be applied in reduction of his recovery.*

Chicago, etc. R. R. Co. v. *Hines,* 82 Ill. App., 488.

When an injured party has voluntarily received satisfaction, or partial satisfaction, for the injury from one tort-feasor, he cannot recover the same again from the others who aided in committing the wrong.

> "It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrong-doers by reason of what has been received from, or done in respect to, one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all."

Cooley Torts (2d Ed.), 160, and note;
Brown v. *City,* 3 Allen, 474.

The "bar" mentioned by Judge Cooley includes a deduction from the total damages, that would otherwise be allowed, of the value, when property wrongfully taken has been returned; and the rule, of course, applies *pro tanto* when a portion only has been tendered back to plaintiff prior to suit, and voluntarily received by him.

Knapp v. *Roche,* 94 N. Y., 329;
Sloan v. *Herrick,* 49 Vt., 327;
Ellis v. *Esson,* 50 Wis., 138, 6 N. W. Rep., 518.

A case directly in point is *Miller* v. *Fenton,* 11 Paige, 20, where the receiver of a bank agreed to release and discharge an officer from all liability incurred by reason of fraudulent transactions, in consideration of the transfer of certain property, but without prejudice to a claim for the same fraud against another, and the Court held that, as the release was not a technical one under seal, therefore it was not a bar to an action against the other wrongdoer, and all that could be claimed would be to have *the actual value of the property which was transferred to the receiver applied in reduction of the amount chargeable* against the defendants jointly on account of their fraud.

In a note in 58 L. R. A., 431, the writer after reviewing a vast number of cases draws the following conclusion:

> "The American rule, sustained by the great weight of authority, is that nothing short of full satisfaction or its equivalent can make good a plea of former judgment in tort, offered as a bar in an action against another joint-tort-feasor who was not a party to the first judgment.
>
> "While the grounds of the decisions under the English cases offer equitable and convincing reasons for their course, viz: The liability of tort-feasors for a joint tort is joint and several. The injured party has the right to pursue them jointly or severally at his election, and recover separate judgments; but, the injury being single, he may recover but one compensation. Therefore, he may elect *de melioribus damnis* and issue his execu-

tion accordingly, but if he obtains only partial satisfaction he has not precluded himself from proceeding against another co-tort-feasor; his election of the first judgment concluding him only as to the amount he may receive, and *whatever has been paid must apply pro tanto upon his further recovery.*"

It is respectfully submitted that for the foregoing reasons the judgment should be reversed.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Appellants.

METSON, DREW &
MACKENZIE,
CURTIS HILLYER,
CHAS. J. HEGGERTY,
Of Counsel.

3

No. 2528.

In the

United States Circuit Court of Appeals

For the Ninth Circuit.

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN, - - - - - - - - - - - - *Appellants,*

VERSUS

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation, - - *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

BRIEF OF APPELLEE.

O. L. RIDER,
Attorney for Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

No. 2528

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN, - - - - - - - - - - - - *Appellants,*

vs.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation, - - *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

INDEX.

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

No. 2528

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN, - - - - - - - - - - - - *Appellants,*

vs.

F. G. NOYES, as Receiver of the WASHINGTON-ALASKA BANK, a Corporation, - - *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

BRIEF *of* APPELLEE.

Statement.

This is a suit by the Receiver of an insolvent bank against its former officers and directors to enforce an alleged liability for their wrongful, unlawful, fraudulent and negligent acts and conduct in managing the affairs of plaintiff bank, whereby the

bank was injured and its assets wasted or diverted so that it is unable to pay its creditors in full. A number of such acts are particularized, but the court found against plaintiff as to all of them except the declaring and paying of a dividend on April 10, 1910, and certain purchases of its capital stock for the bank. As to these, it entered judgment in favor of plaintiff, and with them only this appeal is concerned.

Appellants do not bring the entire decree here for review, but only such portions thereof as are unfavorable to them. Neither do they bring up the entire record in the case, but only such portions thereof as pertain to the portions of the decree appealed from. (Order allowing and settling Defendants' Bill of Exceptions, Rec., p. 1120.) The force of the evidence and the entire survey of the matters in controversy cannot, therefore, be presented to this court in the same full and comprehensive manner that they were to the lower court. For instance: One of the charges of the complaint was that the directors paid the partnership, to which the corporation bank was successor, too much for the capital stock of Gold Bar Lumber Company. The lower court found that the evidence was not sufficient to sustain plaintiff on this item. It therefore passes out of this appeal and the evidence bearing upon the same is not included in the above order allowing and settling the Bill of Exceptions. Nevertheless, appellants devote eight pages of their brief (pp. 123-130) to a discussion of the proposition that "The Directors were entitled to take Gold Bar

stock at its book value." All consideration of such evidence in the Bill of Exceptions as bears upon the value of Gold Bar stock should be eliminated, because it is not certified to be full and complete, and, in so far as the facts touching upon the value of Gold Bar stock concern this appeal, such consideration should be limited to those facts found by the court.

Counsel for appellants seem to have considered this case as a creditors' bill, and hence only rights existing strictly in favor of creditors against officers and directors of a corporation can be enforced. In this they have misconceived the nature of the suit. It is a suit brought by a Receiver of an insolvent bank against such officers and directors, not to enforce the limited rights of creditors in the limited way such rights are enforced, but to enforce the *claims of the bank* against its faithless officers and directors for the injury done the *bank*. True, such a suit redounds to the benefit of creditors, but it is the *bank's claim* which is being enforced as an asset in the hands of the Receiver. This proper conception of the suit will clear away many of the difficulties suggested by counsel to maintaining it.

I know that the relation of the officers and directors to the creditors of a corporation has been a fruitful source of controversy and dissension in the courts and among lawyers generally; but the relation between the officers and directors and the *corporation* is easy of solution. They are its agents and in respect to the care and management of its property they occupy the relation that all agents bear to their

principal—one of trust. As to the property of the corporation, they are *quasi trustees*, and for a breach of the duties arising out of that relation, the corporation has its claim for damages. Upon insolvency, this claim becomes an equitable asset in the hands of its Receiver, and may be enforced and collected as all others may be. The claim of the creditors to it attaches just as to all other assets. They are seeking through the Receiver what they have a right to have —the assets of the bank. To this end the complaint seeks an accounting, a collecting in and marshalling of all the assets of the bank, and a fair and equitable distribution thereof among the creditors. These defendants, by the acts complained of, wasted the assets of the bank, diverted them to improper and unlawful purposes, in some instances converted them to their own use, and now they are called to account just as any other *quasi* trustee would be. As to the fruits of their misdeeds now in their hands, they must disgorge. As to such property as they misappropriated or diverted to improper purposes, they must respond in damages. Such action as the part of the Receiver to collect in the bank's assets is sometimes called "following trust funds" and at other times "enforcing a trust." By whatever term it is designated, the result is the enforcement of the bank's right to have its property restored for the benefit of its creditors.

In support of these principles see the authorities cited under sub-division I *infra*.

ARGUMENT.

As above stated, the respective claims and defenses as to but two matters which go to the merits are before the court on this appeal, namely, the declaring and paying of the dividend, and the purchases of certain shares of stock. In addition to these are two questions of pleading, namely, Is the complaint multifarious? and, Is it insufficient because of failure to plead the corporate law of Nevada? I shall consider these matters under the following subheads:

1. The complaint is not multifarious, because it presents but one cause of action.

2. Failure specifically to plead the corporation law of Nevada has been waived.

3. The defendants Wood, McGinn, Brumbaugh, and Jesson are liable jointly and severally for declaring and paying the dividend as found by the decree.

4. The defendants Jesson, Hill, Peoples, Brumbaugh, and McGinn are liable jointly and severally for the purchases of shares of capital stock made during their respective terms of office as found by the decree.

5. Plaintiff is not limited to a recovery for the benefit only of creditors existing at the times of the acts complained of and whose claims remain unpaid. He may recover to such extent as the bank has been injured.

6. The Barnette trust deeds were not an accord and satisfaction of plaintiff's claims against defendants either in whole or *pro tanto*.

I.

The Complaint Is Not Multifarious, Because It Presents But One Cause of Action.

The complaint presents but one cause of action —the recovery of the bank's funds which have been diverted by the bank's trustees. It makes no difference that all the diversion did not occur at one time or through the acts and conduct of one particular group of defendants. The defendants, during the respective terms of their office, were its directors charged with the duties of *quasi trustees* in the management and control of its property as an entirety. That trust as to it was at all times impressed upon that property. All of it, or any part of it, while under their control, or while under the control of any one or any group of them, was trust property of the bank. If any one of them, or any group of them acting together, wasted it, or converted it, or misapplied or diverted it, to that extent such one or ones breached that trust. While the different breaches may have

been separate and distinct one from the other, nevertheless each and all operated upon the single trust fund, depleted it here and there, and broke it into fragments of which each took his respective part at the respective times. But as to them and each of them it was none the less trust property even though separated from the general mass. Such of it as was converted to their own use was received by them impressed with the trust, *cum onere*, for they knew it was property of the bank, and it is still so held by them and can be followed and reclaimed as against any holder who did not receive it *bona fide*. If they diverted it to the use of another, they did so knowing it was trust property of the bank and must respond to the bank or its representative for the value thereof. The Receiver by following this property and enforcing this trust presents a single issue, a common point of litigation in which all these defendants are interested. The fact that the channels along which this trust property flowed out of the bank's control are numerous, and devious, and not of the same magnitude or origin is beside the question. A court of equity, through its Receiver, can reach out into the various channels, and enforce the trust. It is this trust relation on the part of the directors toward the corporate property that fastens each of them to the common center, their duty as *quasi trustees*. The bank while solvent could enforce this claim against its directors for the injury it sustained due to their wrongful acts. Failing to do so, the claim upon insolvency becomes an asset in the hands of its Receiver and may

be enforced by him for the benefit of those entitled to have the bank's assets.

—Pomeroy Eq. Jur. (3rd ed.), Secs. 1090, 1047;

Zane on Banks & Banking, Secs. 81, 86;

Devlin v. *Moore*, (Or.) 13 Pac. 35, 40;

Brown v. *Schleier*, 55 C. C. A. 474, 480-1, 118 Fed. 981;

Sargent v. *Am. B. & T. Co.*, (Or.) 154 Pac. 759, 763, 766;

Clark v. *Bank*, (W. Va.) 78 S. E. 785, 786;

Benedum v. *Bank*, (W. Va.) 78 S. E. 656;

McTamany v. *Day*, (Idaho) 128 Pac. 563, 565;

Coddington v. *Canaday*, (Ind.) 61 N. E. 567;

Bailey v. *Mosher*, 11 C. C. A. 304;

Yates v. *Jones Nat. B'nk*, (Neb.) 105 N. W. 287;

Cockrill v. *Abeles*, 30 C. C. A. 223.

I am not contending for the principle that corporate assets are trust funds in the full sense of that term. It is not necessary here to do so, although there is very respectable authority to support it. These authorities are cited and reviewed at length in companion cases to this appeal now pending in this court to which reference is respectfully made, namely, *Noyes* v. *Wood et al.*, No. 2593, and *Noyes* v. *Wood*, No. 2594. But I do contend that when a Receiver of an insolvent bank institutes a suit against its officers and directors for misappropriation of its corporate

property that suit presents but a single cause of action, involves a common point of litigation, so that it is not multifarious even though the particular acts complained of occurred at different times and each act was not common to all. For this reason the statute of Alaska respecting joinder of causes of several causes of action (Sec. 1201), cited by counsel for appellants, has no application.

Counsel cites and relies upon but one case to support his contention that several causes of action are improperly united, that of *Emerson* v. *Gaither*, 103 Md. 504. It is a strong case, but it is contrary to the authorities and is not supported by reason, as will be subsequently shown.

Alluding again to the section of the Alaska Code above referred to, I am unwilling to concede that it has any application whatever to the matter under consideration. The Supreme Court of the United States has promulgated rules regulating equity procedure in United States Court which in all probability supercede said section entirely. If they do not, the decisions of the federal courts are controlling in this case in determining what is multifariousness. Those decisions as well as those of many state courts hold that a complaint like the one herein presents but one cause of action.

—*Heckman* v. *U. S.*, 224 U. S. 413, 56 L. ed. 820, 834;

Mullen v. *U. S.*, 224 U. S. 448, 56 L. ed. 834;

Graves v. *Ashburn*, 215 U. S. 331, 54 L. ed. 217, 221;

U. S. v. *Am. Bell Tel. Co.*, 128 U. S. 315, 32 L. ed. 450, 456;

Brown v. *Safe Deposit Co.*, 128 U. S. 403, 412;

Harrison v. *Perea*, 168 U. S. 311, 42 L. ed. 478, 481;

Heyden v. *Thompson*, 71 Fed. 60, 17 C. C. A. 592;

Kelley v. *Boettcher*, 85 Fed. 55, 29 C. C. A. 14, 23;

Curran v. *Campian*, 85 Fed. 67, 29 C. C. A. 26;

Cockrill v. *Cooper*, 86 Fed. 7, 29 C. C. A. 529;

Wyman v. *Bowman*, 127 Fed. 257, 62 C. C. A. 189;

Boyd v. *Schneider*, 131 Fed. 223, 65 C. C. A. 209;

U. S. v. *Allen*, 179 Fed. 13, 103 C. C. A. 1 (Affd. 224 U. S. 413);

Benson v. *Keller*, (Or.) 60 Pac. 218.

In *United States* v. *Allen*, *supra*, which was affirmed in *Heckman* v. *U. S.*, *supra*, the bill, for the reason that it presented a question of common interest to all defendants, was held not to be multifarious. It was one of 301 bills brought by the United States in equity against 16,000 defendants to cancel some 30,000 conveyances. The parties to each conveyance were separate and distinct. The land effected was different. The conveyances consisted of

deeds, mortgages, bills of sale, powers of attorney and almost every conceivable kind of instrument by which rights in real estate could be transferred. The Supreme Court rested its decision upon avoidance of unnecessary suits presenting the same question for determination.

In *Brown* v. *Safe Deposit Co., supra,* the Supreme Court said:

> " It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others."

Hayden v. *Thompson, supra,* and *Cockrill* v. *Cooper, supra,* are cases identical with the one at bar, and the claim of multifariousness was not allowed.

I am informed that the Alaska Code of Civil Procedure was based upon that of Oregon. If that be so, then the decision of the Oregon court above referred to is very pertinent. That court caught the point of a common point of litigation and held that a suit to cancel due-bills *fraudulently* obtained from plaintiff was not multifarious even though various defendants were joined who had an interest in each other's connection therewith, but were each affected by the establishment of plaintiff's claim of fraud in obtaining them from him, though not all parties thereto.

It is respectfully submitted that the complaint is not multifarious and that there was no error in overruling the demurrer on that point.

II.

Failure Specifically to Plead the Corporation Law of Nevada Has Been Waived.

Appellants are now contending that the failure to plead the corporation law of Nevada making it unlawful to purchase the stock, or declare the dividend, renders the complaint fatally defective. This point was never raised before. It was not argued to the lower court, and it is not embodied in the Bill of Exceptions.

The complaint charges as to the matter of the dividend (Par. 27, Rec. 31-32) that on April 12, 1910, when the same was declared, the bank "was, and a long time prior thereto had been, in a grossly insolvent and failing condition;" that it had on hand, after applying the dividend of $25,000.00 that day received on its stock in the Washington-Alaska Bank of Washington, "in apparent surplus, undivided profits and earnings the sum of $32,749.82, while the dividend declared and paid amounted to $33,720.00;" that it "had in fact on said date no earnings, surplus or undivided profits on hand out of which said dividend could be *legally* paid, but on the contrary had at and prior to said date neither capital nor surplus," and then lists items aggregating $287,131.58 as to

which it is alleged its apparent assets should be reduced: that said dividend was "wrongfully, unlawfully and fraudulently declared and paid * * * with the express knowledge, consent and approval of the defendants * * * out of, by and with the funds and money of the depositors of said Fairbanks Banking Company, a corporation, and not by, out of or with the surplus, earnings, undivided profits of said Fairbanks Banking Company;" and that on said date said bank "owed to depositors the sum of $960,689.79."

As to said stock surrenders, it is alleged (Par. 19, Rec., pp. 19-22) that "shortly after said corporation, the Fairbanks Banking Company, commenced business, said corporation wrongfully and *unlawfully* began to reduce its issued capital stock by accepting the surrender thereof and paying therefor either cash or the stock subscription notes given for said stock," a list of which stock so surrendered, giving the amount, date of surrender, number of shares and name of stockholder, is then set out; that during all the time within which said stock surrender took place "the liabilities of said corporation to its general creditors, greatly exceeded its assets, and by accepting the surrender of its capital stock and returning therefor cash or subscription notes, as aforesaid, the assets of said corporation, to which said creditors could look for payment of their claims, were further decreased, and the same w e r e, in the manner and amounts aforesaid, withdrawn and divided among said stockholders;" that said surrender and the re-

turn of said cash and notes as above set forth "were made to and by said corporation with the full knowledge, consent and approval of the defendants and each of them who constituted its directors and officers on the dates aforesaid, or by the exercise of ordinary care the same could have been known to them and each of them," and then follows a list of the officers and directors and the dates of their terms of office.

It is then charged (Par. 37, Rec., p. 40) that the assets of the bank "were, and still are, by reason of the wrongful, fraudulent, and negligent acts and conduct of the defendants herein alleged, insufficient in amount to pay the debts and liabilities thereof in full" and by more than Four Hundred Thousand Dollars.

It is then charged (Par. 38; Rec., pp. 40-41) that "The said wrongful, *unlawful* and fraudulent and negligent acts and conduct of the defendants, while officers and directors * * * as aforesaid, are and were the sole and proximate causes of said assets of said Washington-Alaska Bank being as insufficient, as aforesaid, to pay its liabilities in full, and by reason of said wrongful, *unlawful* and fraudulent and negligent acts and conduct of said defendants, while directors and officers of said Washington-Alaska Bank (formerly Fairbanks Banking Company) *said Washington-Alaska Bank suffered loss and damage* in excess of the sum of Four Hundred Thousand Dollars."

Reverting now to the claim that the allegations of the complaint are not sufficient to charge a statutory liability under the Nevada corporation law because said law is not specifically pleaded, we find that it is charged that said dividend was not declared and paid out of, nor said stock purchases made with, the surplus, undivided profits or earnings of the bank, but out of and with the capital and money of its depositors, and that, in addition to being wrongful and fraudulent, such acts and conduct were "unlawful," and could not be "legally" done. It is not contended that the allegations are not sufficient to sustain a common law recovery and with that question we are not now concerned. The demurrers are general and suggested no insufficiency because of failure to show that the unlawfulness or illegality of the acts complained of lay in failure to plead the Nevada law, and no such suggestion was made to the lower court. If defendants wanted to know wherein such charge of unlawfulness or illegality lay they could have found out by a motion to make more definite and certain. Failing so to move or call the matter to the attention of the lower court, they have waived the point, if it has any force at all.

Moreover, said laws were received in evidence without the slightest objection by defendants (Rec., pp. 391-2). They themselves relied upon parts of them *without pleading them, and offered them in evidence* (Rec., p. . . . .). No exception whatever was taken or saved to their receipt in evidence or to their

consideration as applicable to defendants' liability. The trial proceeded on the theory that they were applicable. It comes too late now after a long, expensive trial has been had, and after three years have elapsed, for counsel who were not present at the trial to complain for the first time of this matter. The defendants were not prejudiced in the least by this failure to plead these laws. Their conduct at the trial shows that. In addition to their failure to object or except thereto, and in addition to the fact that they themselves introduced parts of these laws in evidence without pleading them and relied on them as a defense, is the further fact that the defendants knew from the first stages of the organization of the bank that the laws of Nevada would govern them and determine their liability. The original subscription for stock, copied in Par. 3 of the complaint (Rec., p. 4) recites the contemplated organization of a bank "under the laws of the State of Nevada." The testimony of Mr. McGinn, the bank's attorney at the time of the organization and for a long time afterwards, and one of the defendants herein and leading counsel at the trial, when testifying at the trial shows that consideration of the Nevada laws and their applicability were not new matter. He says (Rec., pp. 920-921):

> " A. Yes, sir. I had Frost on Corporations. When I looked up where they have the statutes where it is prohibited that they shall buy any stock, and there was no law on that subject, *no prohibition against it in the law of Nevada,* according to Frost. I still have that work."

It is provided by the Alaska Code of Civil Procedure, Sec. 929, as follows:

> "The court shall, in every stage of an action, disregard any error or defect in pleading or proceedings which shall not affect the substantial rights of the adverse party."

It is respectfully submitted that no prejudice has resulted to defendants by reason of the failure to specifically plead the corporation law of Nevada.

III.

The Defendants Wood, McGinn, Trumbaugh and Jesson Are Liable Jointly and Severally for Declaring and Paying the Dividend as Found by the Decree.

The findings of fact, as to declaring and paying said dividend are contained in Findings 60, 61, 62 and 63 (Rec., p. 214), and they are as follows:

> "LX.
>
> " That on the 12 day of April, 1910, the said Fairbanks Banking Company, by its board of directors, declared a dividend of twenty per cent on its then outstanding capital stock of $168,600, which dividend amounted to $33,720.00, and which said sum was paid to the stockholders of said bank either in cash or by crediting the amount thereof upon notes owing by said stockholders to said bank."
>
> "LXI.
>
> " That at the time said dividend was so declared and paid, the said Fairbanks Banking

Company did not have any surplus or undivided profits out of which the same could be declared and paid."

"LXII.

" That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal."

"LXIII.

" That at the time said dividend was declared and paid, the defendants Wood, McGinn, Brumbaugh and John A. Jesson, were members of the board of directors of the said Fairbanks Banking Company, and gave their consent thereto."

These findings having been made upon conflicting evidence are conclusive on appeal, unless a serious and important mistake has been made.

—*Shields* v. *Mongallon Expl. Co.*, 70 C. C. A. 123.

That the dividend was declared and paid as found in Finding 60, there is no dispute, nor is there dispute as to Finding 63. It remains to examine the record sufficient to ascertain if there is evidence on which to base Findings 61 and 62. If there is, then they must be accepted as facts and the law properly applied to them. They will be considered in their order. *(a)* Did the bank at the time the dividend was declared and paid have surplus or undivided profits out of which the same could be declared and paid?

(b) Was the dividend paid in violation of the laws of Nevada, and in violation of the by-laws of the bank, and was such declaration and payment wrongful and illegal?

(A) As shown by the books of the bank, according to the testimony of Sidney Stewart (R., p. 386), the Fairbanks Banking Company had on that day as undivided profits $7,749.82 to which was added $25,000.00 of the dividend received from the Washington-Alaska Bank of Washington, making a total undivided profits of $32,749.82. The dividend declared amounted to $33,720.00 or $970.18 in excess of the total undivided profits if all the assets of the bank were worth their book value. On that day (Rec., p. 386) the bank was carrying as assets the following: Gold Bar Lumber Company stock $341,949.00; Washington-Alaska Bank of Washington stock $250,000.00; paper then past due and still unpaid $111,243.51.

As to Washington-Alaska Bank stock, it is only necessary to refer to the cross examination of the defendant Wood to find testimony sufficient to destroy all his testimony previously given on behalf of himself and his co-defendants that it was worth $250,000.00 and depreciate it at least $75,000.00. This witness perhaps had more intimate and competent knowledge on that subject than any other one that could be found. He was a banker of years of experience at Fairbanks, a member of the partnership of Fairbanks Banking Company to which the corpora-

tion plaintiff succeeded. After the incorporation, he was its cashier until June, 1908. In the early fall of 1909, at the time when the Fairbanks Banking Company, the Washington-Alaska Bank of Washington and the First National Bank pooled their interests, and Fairbanks Banking Company purchased this Washington-Alaska Bank stock, he became cashier of the latter bank and manager of the three institutions. This latter position he held until some time in May, 1910, and at the time the dividend was declared. He prepared a record of the notes and securities, loans and discounts of the Fairbanks Banking Company and said Washington-Alaska Bank showing all the information he could obtain concerning the same. He required the cashiers of these two banks to submit him reports of their affairs, and would meet with them after banking hours and go over the affairs of the two institutions with them. Thus he became thoroughly familiar with the affairs of both the Washington-Alaska Bank and its sole stockholder the Fairbanks Banking Company. Substance testimony of R. C. Wood. (Rec., pp. 654-664.)

Now this witness prior to the trial herein, on the trial of certain criminal cases against Barnette, had at Valdez, Alaska, in December, 1912, was examined as a witness respecting several of the matters in controversy in this action, among them the worth of the Washington-Alaska Bank stock. His cross examination respecting the matter is found at pages 747-751 of the record herein, a portion of which is as follows:

" Q. Now, you said something about the value of that stock. I don't think I got your answer. A. On April 12th?

Q. Yes, if that was the time you were testifying about?

A. I said I considered that the directors thought that the value of the Washington-Alaska Bank stock was about $225,000.

Q. More than one of the directors?

A. Yes, sir.

Q. What did you consider it worth?

A. Well, I considered it the same as the other directors.

Q. You considered it worth $225,000?

A Yes, sir.

Q. On April 12, 1910? A. Yes, sir.

Q. What did you consider it worth on December 31, 1909?

A. Well, I thought it was worth $250,000.

Q. What do you think it was worth in September, 1909, when they bought it?

A. Well, I think it was worth that amount.

Q. You think it was worth $250,000?

A. Yes, sir, and I think other men will say the same thing.

Q. Your testimony respecting that matter was given by you in the Barnette cases, was it not?

A. I testified that I t h o u g h t they paid $75,000 too much for it.

Q. When you gave your testimony at Valdez you testified that you thought they paid $75,000 more than it was worth, didn't you?

A. I don't remember about that.

Q. Let us see. Let me read the questions and answers. This is a question on direct examination by Mr. Crossley (reads): 'Q. You knew what had been paid for the Washington-Alaska Bank? A. I did. Q. As a conservative banker, would you have paid $250,000 for it? A. I certainly would not.' You gave that testimony, did you not?

A. I don't remember that.

Q. There were some objections and interruptions following that, and then continuing (reads): 'Q. It was purchased in September, 1909. What was its value then? What was it worth then? A. That is a pretty hard question to answer. If you take the actual book value of the bank, and give nothing for its good will, the value of that bank at that time—and charge off its bad debts—would have been, I think, about to the best of my recollection, not over $175,000. I doubt whether it would have brought that much if it had been liquidated at that time. Q. In other words, they paid $75,000 more than it was worth, in your opinion? A. That has always been the way I felt about it'."

As shown by the testimony of Mr. Stewart, above referred to, there was carried on said date, as a part of the assets of the bank, $111,243.51 of paper, which was then past due and is still unpaid. Some of this paper had been past due two or three years at that time. Mr. Wood was a banker of experience and a good collecter of paper. There can be no reasonable doubt but that he used every effort possible to collect in the amount due on this paper, and if it could have

been collected, he would have done so. He was examined and cross examined upon this subject, and his cross examination is found at pp. 753-768 of the record, and no reasonable inference can be drawn from it but that many thousands of dollars worth of this paper was utterly worthless and uncollectable. Some of it had been previously charged off by the bank, an attempt had been made to collect some of it by suit, and in one instance at least, the maker of the paper was a bankrupt. Of this paper, $69,908.94 is paper that was received from the partnership in March, 1908, and is still in the hands of the receiver, unpaid and uncollectable. This paper was past due from six months to two years at the time the bank took it over from the partnership. Mr. Wood was a member of that partnership—its cashier—and was also the cashier of the succeeding corporation. There can be no reasonable conclusion from this testimony except that this paper was uncollectable and utterly worthless. Included also in the past due paper received from the partnership were two notes executed by the Tanana Electric Co., aggregating $27,997.38. There is no question whatever about the worthlessness of these notes, and they alone are sufficient to practically exhaust the pretended undivided profits out of which the dividend was paid. The Tanana Electric Company of itself was of no financial worth and these notes depended for their sole worth upon an alleged guaranty of the Scandinavian-American Company, of Seattle, which guaranty the court found never had any existence. These notes were originally given to

the partnership bank and were long past due at the time they were taken over by the corporation.

The defendants, W o o d , McGinn and Jesson, against whom judgment for this dividend was rendered, were closely connected with the affairs of the corporation bank from its inception, and there can be no question but that they knew all about the utter worthlessness of the Tanana Electric notes.

Mr. Hill, who testified as a witness for the defendants respecting this matter, was also a member of the original partnership and an officer in the succeeding corporation. He was examined and cross-examined on the subject of these notes, and his cross-examination a p p e a r s at pages 807 to 826 of the record. This cross examination completely destroys the testimony given by Mr. Hill on direct examination and shows that the claim of a guaranty by the Scandinavian-American Bank never had any existence.

Counsel for appellants quote a portion of this testimony at pages 132 to 140 of their brief, but they very adroitly c l o s e the quotation at the question where the impeaching testimony of Mr. Hill is developed, and thereby omit the testimony which shows that, to say the least, he was mistaken in all his preceding statements in this matter. This omitted portion of the cross-examination clearly shows that the bank never at any time relied upon the pretended guaranty of the Scandinavian-American Bank, and to it the court is respectfully referred.

The other item of assets referred to in Mr. Stewart's testimony is capital stock of the Gold Bar Lumber Company, carried at $341,949.00. While the court made no specific finding as to the actual worth of this property at the time the dividend was declared or at any particular time, he did find as to the same, generally, as follows (F., 40, R., 204.)

> " That at the time said investment was so made as aforesaid, said lumber company was closed down and immediately prior to closing down, it had been operated at a loss, that in so far as said lumber company was able to operate since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best asset exhausted. That no dividends have ever been paid on the capital stock of said lumber company during the time the same was owned by said bank."

Counsel state in their brief at page 126, speaking of the Gold Bar stock, that, "at the time of the trial Peterson valued the property at Three Hundred Thousand Dollars and stated that in 1908 and 1910 its value was greater." Peterson did so testify on direct examination. His cross examination appears at pages 533 to 547 of the record, which is not referred to by counsel but which the lower court heard and considered. I wish to refer to a portion of it appearing at pages 545-46, from which it appears that Mr. Peterson's bank foreclosed its lien on this

stock which it held to secure an indebtedness due from the Fairbanks Banking Company. The sale under this foreclosure was completed but a short time before his deposition was taken, and it appears from the above testimony that his bank bid in the stock at this sale for a Hundred Thousand Dollars, a sum much less than the amount of his bank's lien, and that his bank still asserts a claim against the plaintiff's bank for any deficiency above a Hundred Thousand Dollars. I quote from his testimony (Rec., p. 546):

"Q. This property you say is worth $300,000 at this time?

A. Yes, we believe it to be worth about that.

Q. Yet you only bid $100,000 on it when you had a claim being foreclosed and reduced to a judgment in a sum in excess of $100,000?

A. Yes.

Q. You feel, then, that you have received on that sale property worth $300,000.

A. Yes, we believe that—that is an interest in the property worth that much.

Q. Well, you have got a four-fifths interest in the property (465), worth that much?

A. Yes, worth $300,000.

Q. And therefore you have received property more in value than the amount of your judgment? A. Yes.

Q. Do you still assert a claim against the bank for the deficiency between your judgment and the $100,000?

A. Yes, sir, we do."

From the foregoing review of the testimony respecting the worth of the assets at the time the dividend was declared, it is respectfully submitted that the finding of the court—that at the time said dividend was declared and paid, the bank did not have any surplus or undivided profits out of which the same could be declared and paid—is supported by the testimony. The Tanana Electric notes alone were sufficient to practically exhaust the pretended profits, to say nothing of the other past due paper, Gold Bar Lumber Company stock and Washington-Alaska Bank stock.

(B) Was the dividend paid in violation of the laws of Nevada and in violation of the by-laws of the bank, and was such declaration and payment wrongful and illegal? The court, by its finding, 42, answered this question in the affirmative.

The by-laws of the bank on this matter appear at page 390 of the record and they provide, "Said dividends to be declared by the Board of Directors at the first regular meeting held subsequent to the 30th day of June and the 30th day of December of each year." This dividend was declared on April 12th. This was a clear violation of the by-laws and the court's finding was strictly in accord therewith. There is an effort to evade this situation by the contention that the dividend was declared *as of December 31st.* This matter will be dealt with later on.

As to the finding of the court that the dividend was declared in violation of the laws of Nevada, the court is respectfully referred to pages 391 and 392 of the record where such laws are copied. They plainly prohibit the payment of any dividend (except from the net profits arising from the business) and they further provide that the directors, under whose administration any violation of said section may have happened, shall, "in their individual and private capacities, be jointly and severally liable *to the corporation* and the creditors thereof to the full amount so * * * paid out."

It is respectfully submitted that finding 42 is in accord with the evidence.

We are now brought to a consideration of paragraphs 8, 9, 10, 11 and 12 of appellants' briefs, the substance of which is that the directors in declaring a dividend, acted in good faith and in the actual belief that the bank was solvent and possessed of a surplus and that their judgment in declaring the dividend is conclusive.

The evidence does not support these conclusions.

On April 13th, 1908 (Rec., pp. 448-449), the directors adopted a resolution requiring that a written report of the condition of the bank be presented at each monthly session and it was conceded at the trial that such monthly reports were made by the president. The minutes of the directors' meetings, copied in the record, show that this resolution was obeyed

and that when such report was presented, it was carefully considered by the directors and ordered filed. In this way the directors must have been constantly informed of the condition of the paper of the bank and the value at which the paper and the stock owned by the bank were carried. Three of the directors, against whom judgment for declaring this dividend was rendered, Messrs. Wood, Jesson and McGinn, were with the bank at its organization and must have known the worthlessness of its past due paper, particularly the Tanana Electric notes. Wood, according to his testimony heretofore referred to, must have known that the capital stock of the Washington-Alaska Bank of Washington was carried as an asset at a gross over-valuation of at least Seventy-five Thousand Dollars. Wood also knew the worthlessness of the Tanana Electric notes. Reference is made to his testimony in the record, pages 768 to 775, from which it appears that in August, 1912, the receiver herein was endeavoring to collect these notes on the Scandinavian-American Bank, the alleged guarantor, and brought suit thereon for that purpose. Wood was offered as a witness respecting this guaranty. He then testified that the advances to the Tanana Electric Company, for which these notes were given, were not made at the instigation of the Scandinavian-American Bank but were made at the instigation of the management of the directors of the Tanana Electric Company, and that there was never any reason for charging these amounts to the Scandinavian-Ameri-

can Bank, until instructions were received from it to do so. He further testified as follows (Rec., p. 773):

> " Q. And the Scandinavian-American Bank did not authorize you in the usual course of business, or in any other manner, to advance these sums on their credit to the Tanana Electric Company, that you know of?
>
> A. Not that I know of.
>
> Q. As a matter of fact, you know that they did not?
>
> A. I know that they refused to."

To the same effect is the testimony of the defendants' witness, Volney Richmond (Rec., pp. 849 to 851).

The defendants herein have taken so many different positions regarding the circumstances attending the declaration of this dividend that it is impossible to reconcile them with each other or with their present claim of good faith. The dividend was declared on April 12th, 1910, and there is nothing in the resolution of the directors declaring it, appearing at record, page 384, to show but what it was intended to be declared on the condition of the bank on that day, and because of apparent surplus. At the trial it was first endeavored to create the impression that, although declared on April 12th, it was paid out on a subsequent date, between which time and the declaration of the dividend there had been an increase in the undivided profits of the bank sufficient or nearly sufficient to equalize the payments. See defend-

ants' cross examination of Sidney Stewart (Rec., pp. 434-435). In other words, that the dividend was declared in expectation of the collection of certain accrued interests which, when collected, would be sufficient to approximately meet the dividend. While it appears that there was an increase in the interest collections, as shown by the books, it subsequently developed that this increase was only apparent and arose through an application of this dividend to the interest accruing on stockholders' notes. In fact, at the Barnette trial, above referred to, Wood testified (Rec., p. 752), in substance, that one of the purposes of declaring the dividend was to reduce interest on stockholders' notes. Counsel, who represented the defendants at the trial of the case, went to great labor in showing that at certain dates subsequent to April 12th, a profit was shown by the books in excess of the dividend, by adding the interest accruing on stockholders' notes to the Twenty-five Thousand Dollars received as a dividend on the Washington-Alaska Bank of Washington.

It was next contended that while the dividend was declared on April 12th, it was declared on the condition of the bank *as of December 31st, 1909*. At times this was claimed by both Wood and McGinn, while testifying as witnesses for the defendants, but this claim is unreasonable. It required the Twenty-five-Thousand-Dollar dividend on the stock of the Washington-Alaska Bank of Washington to make an apparent surplus sufficient to pay a dividend by the

Fairbanks Banking Company, but the dividend of the Washington-Alaska Bank was not declared until April 12th, 1910. How then could it have been used in computing the profits of the Fairbanks Banking Company on December 31st, 1909?

Unfortunately for Wood, however, he was examined on said Barnette trial respecting the affairs of the bank on December 31st, 1909, and on that trial he was (Rec., pp. 741-44) inquired of concerning the bad paper of the bank on December 31st, 1909, and testified that there was charged off practically Twenty-six Thousand Dollars at that time and further said, "December 31st, 1909, I think we charged off all the bank could stand at that time, *the earnings of the bank itself* or most all of it."

The foregoing establishes the want of good faith on the part of the directors in declaring a dividend. It shows conclusively that there was no good faith, especially as to Wood and McGinn, defendants, against whom judgment for this item was entered.

Counsel quote, at page 146 of their brief, as proving that the directors actually possessed a surplus on April 12th, 1910, the testimony of John A. Clark, one of the defendants herein. That testimony is utterly worthless, because Clark was not a director when the dividend was declared and was not elected until a month thereafter (Rec., p. 892). Testimony quoted by counsel further shows its worthlessness because it appears therefrom that it relates to the condition of the bank on *October* 12th, 1910.

The fact that McGinn carried a large deposit in the bank proves nothing as to his actual belief as to the condition of the bank. He may have felt that because of his close connection with the managers of the bank, he would be protected. At any rate, it appears in the record that very shortly after the dividend was declared and paid, Wood and McGinn severed their connection with the Fairbanks Banking Company, by purchasing from it the entire capital stock of the First National Bank. McGinn seems to have wasted no time in withdrawing his deposit by applying it to the purchase of half of this stock.

Counsel for appellants rest their position as to this subject on the law applicable to transactions of a like character done in good faith. The facts fail them as to their good faith. They must, under their own citations of authority, be held liable for declaring this dividend. Furthermore, the dividend was declared in violation of the positive terms of their own by-laws and of the banking laws of Nevada.

In my briefs heretofore filed herein, in companion cases arising out of the same state of facts and pending in this court, namely, *Noyes* v. *Wood*, Nos. 2593 and 2594, the liability of the directors for fraudulent, negligent, unlawful and illegal acts, is fully briefed and discussed, to which reference is now respectfully made as to the law applicable to the matter under consideration.

That the defendants are liable for declaring and paying the dividend under the evidence and the facts found by the court, see:

Appelton v. *Elec. Veh. Co.*, (N. J.) 65 Atl. 910;

Coleman v. *Booth*, (Mo.) 186 S. W. 1021;

E. L. Moore Co. v. *Murchison*, 141 C. C. A. 435, 437;

Briggs v. *Spaulding*, 141 U. S. 132, 35 L. ed. 662;

Cottrell v. *Mfg. Co.*, 126 N. Y. S. 1070;

Cooper v. *Hill*, 36 C. C. A. 402;

Cockrill v. *Cooper*, 29 C. C. A. 529.

It is respectfully submitted that the judgment of the lower court against the defendants, Wood, McGinn, Brumbaugh and Jesson, jointly and severally, for $33,720.00 on account of the declaration and payment of the dividend of April 12th, 1910, should be affirmed.

IV.

The defendants, Jesson, Hill, Peoples, Brumbaugh and McGinn, are liable jointly and severally for the purchase of shares of capital stock of the Fairbanks Banking Company, made during their respective terms of office, as found by the decree.

The findings of the court on these matters are contained in findings 29, 30, 31, 32, 33, 34, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54, and the conclu-

sions of law drawn by the court, on which the judgment herein complained of was entered, are numbers 2, 3, 4, 5, 6, 7 and 8. (Rec., pp. 200, 202, 205, 211, 216 and 217.)

As to the surrender of stock issued to Strandberg Brothers and Johnson and to the defendants, R. C. Wood and John L. McGinn, covered by findings 29 to 34, and 45, 48 and 49, the court refused to enter judgments therefor. They do not concern the matters involved in this appeal further than the bearing they have upon the general policy of the bank to accept surrenders of its stock.

Generally as to all of these surrenders, the court made the following findings (F. 51, 52, 54; Rec., pp. 209-211):

LI.

"That when stock was so taken back by the corporation, the amount paid therefor was either paid in cash, or notes held by the bank were cancelled and surrendered to the stockholders.

"That said bank had no surplus or undivided profits against which the same could be charged."

LII.

"That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized."

LIV.

"That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval."

As to the stock of Wood, McGinn and Strandberg Bros. and Johnson, for the surrender of which the court declined to enter judgment against the officers and directors, the receiver herein has taken an appeal which is pending in this court, entitled, *Noyes* v. *Wood et al.*, No. 2593, in which the law applicable to said surrenders is fully discussed and the authorities reviewed. To that brief (pages 76 to 105) reference is now respectfully made, inasmuch as it relates to transactions similar to the ones in this case and is directed to the same findings of fact.

The general right of a corporation to purchase its own stock has been frequently before the courts and they are divided upon this question. The courts of England have established and rigidly adhere to the rule that a corporation cannot become a purchaser of its own shares. In the United States, where such right has been allowed, it is generally derived from statute; or in the absence of a statute positively prohibiting it, the defendant corporation was acting within some recognized exception to the rule prohibiting it, as where, for instance, it was not prejudicial to the rights of creditors or stockholders or where the purchase was not made out of the capital but out of the surplus and undivided profits. The cases cited

by counsel for appellants in the instant case do not contravene this rule. The substance of counsel's contention is that if the directors acted in good faith and without injury to the creditors, there is no liability. Although some decisions declare this to be the rule, the further proviso is most frequently added that the purchase shall be made out of the surplus and not out of the capital.

The Nevada law prohibited the trustees from dividing, withdrawing or in any way paying to the stockholders any part of the capital stock. It also prohibited a reduction of the capital stock unless done in the manner prescribed in the act. It will thus be noted that two of the common methods resorted to to deplete the capital stock are condemned and prohibited. Counsel in their brief at page 88 laid great emphasis on their contention that the purchase of stock complained of did not reduce the capital; but the statute also prohibits a division, withdrawal or payment of any of the capital to the stockholders. The complainant herein does not charge a reduction of capital but charges that shortly after commencing business, the bank began to reduce the *issued* capital by accepting surrenders thereof (Par. 19, Rec., pp. 19-22). There was no intention to charge an unlawful *reduction of the capital stock* denounced by the act. The capital stock of the company always remained, as provided in its articles, at Three Hundred Thousand Dollars. The outstanding or issued capital stock, however, was reduced by accepting sur-

renders thereof to the bank and these are the acts complained of. Counsel's position is a little inconsistent with itself on this matter, however, because while contending at from pages 88 to 95 that the buying of the shares of its own capital did not reduce the capital stock, they contend at page 150 that creditors whose debts were contracted subsequent to the reduction, can only look to the capital as reduced.

While defendants claim that there was no intention to reduce the capital stock by accepting these surrenders, nevertheless they really treat the matter as though the capital stock had been reduced. The stock purchased was no longer considered as a liability of the bank and when the directors declared a dividend, it was only distributed among the holders of outstanding stock; no portion of this dividend was set aside as belonging to the stock which had been surrendered to the bank.

Counsel claim that the purchase of this stock was without the knowledge and against the instruction of the directors. There was a conflict in the testimony on this matter and the lower court, after hearing all of the testimony, resolved this point against the defendants (F. 44, Rec., p. 211), and by this finding we are bound on appeal.

There was abundant testimony to support the finding. At every monthly meeting of the directors, a statement showing the financial condition of the bank was laid before them and considered by them.

This statement alone would constantly keep the directors advised to the effect that the outstanding capital stock was being reduced. In numerous instances shown by the testimony, the directors expressly authorized the surrender and purchase of the stock. At other times actions of the executive committee, authorizing the acceptance of stock by the bank were formally approved by the directors.

On July 13th, 1908, immediately following the surrender of Wood's stock, that being the first surrender, the directors expressly resolved that, "It was the sense of the meeting that any stockholder desiring to give up his stock be paid for same and the stock returned to the treasurer of the bank." (Rec., p. 457.) This resolution declared the initial policy of the bank.

Between June 30th, 1908, and October 25th, 1910, thirty-nine distinct surrenders of stock, occurred in an amount aggregating a total of Fifty-six Thousand Dollars. This would certainly justify the court's finding that such surrenders were frequent and continuous. (F. 44, R. 206.) They were in fact a carrying out of the declared policy above referred to. The matter came before the board expressly in a number of instances and by them, surrenders were expressly authorized. In a few instances they declined to accept a surrender, but the very fact that the matter was so frequently before the board would, of itself, bring to their attention the knowledge that the stock was being surrendered.

Mixed up with the occasions on which the directors were authorizing these purchases, they did on two occasions resolve not to buy any other stock, namely, on April 12th, 1909, and October 14th, 1908. (Rec., pp. 863 to 866.)

As to the first of these resolutions (864) it appears that one, Thrash, wanted to dispose of his stock to the bank. The executive committee acted on the matter on February 3rd, 1909, and authorized that answer be made that the bank "did not desire to buy any stock *at the present time.*" The minutes of this meeting were approved generally by the directors on the following April 12th. But on the following June 10th, Hart and McConnell were permitted to surrender their stock in the sum of a Thousand Dollars. A complete list of the dates on which stock surrenders were accepted by the bank and the total amount of stock accepted on each day appears at page 355 of the record, except that there should be added thereto the surrender on October 25th, 1910, of the John L. McGinn stock, amounting to Ten Thousand Dollars. This list shows the total amount surrendered on each of the dates therein named but does not show the names of the individuals whose stocks were surrendered. Immediately following this list of stock surrenders appears the testimony of Sidney Stewart (pages 358 to 372, 472) showing the condition of the bank on said dates. From this testimony it appears that on every date from June 30th, 1908, to and including June 10th, 1909, during which time $41,-

500.00 of stock was surrendered back to the bank, the liabilities of the bank exceeded its assets as shown by the books of the bank, except on January 12th, 1909, when the books showed an excess of assets amounting to $200.00. As to the action of October 14th, 1908, above referred to, it appears that on Sept. 14th, 1908, the executive committee, having before it the application of Hans Stark for the surrender of his stock, expressed the sense of the meeting to be that, "It was not policy *at this time to continue* taking over stockholders' interests."

On September 12th, 1908, two days previous to the above meeting of the executive committee, the directors expressed the sense of the meeting to be "that the bank take back the stock of Mr. Hans Stark and pay him therefor par value." At said meeting of the board of directors on October 14th, 1908, the minutes of the executive committee and the minutes of the meeting of the board of directors above referred to were each approved. This of itself makes a farce out of the whimsical resolutions of the directors and executive committee and leaves the usual course of business dealing of the bank in accepting these surrenders to stand as the best expression of their policy in that regard.

Counsel contend in their brief that the Nevada law was not violated because it does not forbid the *reduction* of the capital stock but provides a method by which it may be done. As above stated, that portion of the Nevada law just referred to has nothing

to do with this case, because it applies to a reduction of the capital stock and not to a withdrawal, division or payment of a part thereof to the stockholders. Furthermore, while the Nevada law does p r o v i d e a method by which the capital stock may be reduced, the testimony is positive that none of the things required by said laws in reducing the capital stock were done or attempted to be done in the matter of these stock surrenders.

While the articles of incorporation did authorize the Fairbanks Banking Company to buy and sell stocks, they did not authorize it to deal in its own stock. A provision of the articles of incorporation authorizing the dealing in stocks does not include dealing in the corporation's own stock. *(Maryland Trust Company* v. *Bank*, (Md.) 63 Atl. 70.) Furthermore, if such articles did authorize the purchase of its stock for the bank, the same would be void, because in conflict with the statute of Nevada under which the bank was incorporated. *Cooper* v. *Hill*, 36 C. C. A. 402-407.

It is respectfully submitted that the judgment of the lower courts against the defendants herein for the stock surrenders occurring during their respective terms should be affirmed.

V.

Plaintiff is not limited to a recovery for the benefit only of creditors existing at the times of the acts complained of and whose claims remain unpaid. He may recover to such extent as the bank has been injured.

I have not had time or opportunity to examine all of the cases cited by counsel on this subject. They seem to rely, however, most especially upon *McDonald* v. *Dewey*, 202 U. S. 510. The facts in that case and the point under consideration by the court are entirely distinct from the case at bar. In the *McDonald* case the receiver was suing to enforce the added stockholders' statutory liability. This is a liability created solely for the benefit of creditors. In other words, it was a distinct right of the creditors which was being enforced and of course it would not be right to enforce this liability against a stockholder who was not such stockholder when the particular creditor dealt with the corporation. But in the case at bar, the receiver is enforcing a right of the bank against its faithless officers and seeking to recover for the injury to the bank. This claim against the officers, as has been heretofore pointed out, is an asset in the hands of the receiver; but it is none the less a claim of the bank and not a claim of the creditors, which is being enforced. With this view of the matter, it can make no difference when the creditors now existing became creditors.

If the other cases cited by counsel support the principles expressed by them in their brief, then they too seem to be cases in which the specific rights of creditors were being enforced. They relate to the setting aside of fraudulent conveyance by the debtor. Of course, a conveyance by a debtor in fraud of his creditors would give rise to a claim in favor of the creditors existing at the time but that has nothing to do with a case where the receiver is enforcing a claim existing in favor of the insolvent corporation itself, as is the case at bar. That it need not be shown that the creditors were such at the time the alleged wrongs were committed, see the following cases: *Coleman* v. *Tepel*, 144 C. C. A. 361-369; *Hamon* v. *Taylor Rice Engineering Company*, 84 Fed. 393; *North* v. *Union S. & L. Association*, (Ore.) 117 Pac. 822-825; *Coleman* v. *Booth*, (Mo.) 186 S. W. 1021. Cook on Corporations, 6th ed., section 548:

> " Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when dividend was declared, *or becoming such at any subsequent time*, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock."
>
> —Cook on Corporations, *supra*.

VI.

The Barnette trust deeds were not an accord and satisfaction of plaintiff's claims against these defendants, either in whole or *pro tanto*.

The substance of the answers filed by the various defendants pleading these trust deeds is, that they were executed in full satisfaction of all the wrongs complained of in the complaint; that the promises therein made by Barnette were made on the *distinct understanding and agreement* that no litigation would be instituted against him or others for or on account of the matters and things set up in the complaint; that for this purpose and to prevent any litigation, and as security for the faithful performance of said promises, and with the knowledge, consent and approval of the court, the trust deeds were executed; that the receivers agreed to accept the property therein conveyed in full satisfaction of all matters and things set forth in the complaint, and that Barnette and his wife made and executed said promises and conveyed said property in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the bank and in full satisfaction of all the matters and things set forth in the complaint, and that the receivers accepted and received said promises and property in full satisfaction of all claims and causes of action set up in the complaint; that the amounts of money and property

already received by the receivers from the estate of Barnette are more than ample to pay all the matters and things charged against these defendants, Wood, Healy and McGinn, and they a l l e g e that all the wrongs and things charged against them in the complaint have been fully satisfied and paid.

The remaining defendants plead as to this matter that when Barnette returned from Fairbanks, he voluntarily submitted to the then receivers, a proposition wherein he acknowledged that he was liable for any irregularities that might have occurred in the management of the bank and for any loss sustained by reason of any of the acts and things that are in the complaint alleged to have been performed and done by the directors and officers of the bank; that in the trust deeds he acknowledged his liability for the payment of the amounts due to the depositors and holders of unpaid drafts as well as any other indebtedness of the bank by which he might be liable by reason of any mismanagement on his part; that said deeds were delivered for the express purpose of securing the payment, not only of the depositors and holders of unpaid drafts, but also any other indebtedness of any nature or description owed by the bank at the time of its suspension; that at the time said proposition was made by Barnette and his wife, the attorneys for the receivers had prepared a complaint against Barnette and some of the other directors, charging Barnette and said other directors with most, if not all, the alleged wrongful acts contained in the

complaint; and that it was understood by the receivers, by their attorney and by said Barnette that the execution of said deeds and the delivery thereof and their acceptance by the receivers was to be in full settlement of all claims of every nature and description that might exist against Barnette and the other directors by reason of or because of any of the acts and things done and performed by said directors; and that said deeds were accepted as a full release and discharge of all liability of said Barnette and his co-directors for any and all alleged wrongful acts and things done or performed in connection with said bank; that the deeds were accepted in full accord and satisfaction of all liability of Barnette, as president and director, and of his co-defendants, during the several periods of their incumbency; and that by reason of the payment in full of all claims with which these answering defendants could be charged, as set forth in the complaint, these defendants are discharged from any and all liability and any and all damage occasioned to said bank by reason of the alleged wrongful acts and things.

There was not the slightest attempt made to prove the allegations that a complaint had been prepared against Barnette and some of the other directors, charging them with all or any of the acts complained of in the complaint herein, nor was there any attempt to prove the alleged understanding between Barnette, the receivers and their attorney that the execution and delivery of these deeds was accepted

in full settlement of all claims against Barnette and the other directors or in any particular as settlement of such claims.

The defendants, having asserted these t r u s t deeds as a defense, it was incumbent upon them to prove that they were executed, delivered and accepted for the purposes and under the circumstances claimed by them. There isn't a particle of testimony to show that Barnette was settling any claim against any person other than himself, nor is there any testimony to show the character and amount of the liability on his part, referred to in the trust deeds. It is purely a conjecture on the part of plaintiffs that it was a tort liability. There is nothing to refer it to the torts sued on, nor is there anything in the trust deeds to show that Barnette considered himself subject to a claim for tort committed either by himself or in connection with these defendants. So far as the deeds and the proceedings had respecting them disclosed, it was just as apparently a contract liability, or pure moral obligation, that Barnette had in mind. It is not necessary for the court to find what particular motive prompted Barnette to execute these deeds; the only question is, was he acting in the settlement of a joint tort liability between himself and these defendants? Nowhere in the proceedings does he concede that a liability exists against him for fraud arising out of his management of the affairs of the bank. It can just as reasonably be inferred from the instruments themselves, and that is the only evi-

dence on the subject, that Barnette, realizing that he had been an active and responsible party in the management of the affairs of the bank and that by reason of the same not being conducted successfully, loss had resulted to those who relied upon his business judgment and integrity, which loss, as a purely moral obligation, he now wished to repair. If such was the case, then, clearly, he was not settling any claim for tort against these defendants for their fraudulent acts.

Nor is the evidence of such compelling force as to lead to the conclusion that the receivers or their attorneys or the court understood the trust deeds in the sense contended for by counsel. It is remarkable that counsel should not introduce some testimony to prove so important an alleged understanding. Depositions were taken by the defendants on many of the matters involved in their answers and they even took depositions and introduced testimony respecting the character and value of the property referred to in the trust deeds but they never attempted to take the testimony of the receivers who accepted the trust deeds or of their attorneys or of Barnette and his wife who gave it, nor of the court, under whose directions they were accepted, for the purposes of proving their allegation as to the alleged understanding between these parties in the acceptance of the deeds. Failure to offer such testimony or some excuse for not doing it, compels the conclusion that had these witnesses been offered, their testimony would have been adverse to the contention of counsel.

It may have been in the minds of the receivers that there was danger in the future of such contention being made and hence the reason for petitioning the court, asking his advice in the matter and suggesting to him that the acceptance of these deeds might make impracticable a suit against Barnette. But inasmuch as the court directed them to accept the deeds, and evinces no intention whatever to discharge anyone from tort liability, it must follow that the court did not regard the acceptance of these deeds as in any way affecting any tort liability which might subsequently be asserted.

Again, the deeds show on their face that they are executed solely for the benefit of "depositors and the holders of unpaid drafts." If Barnette was settling a tort liability, why should he settle it only as to depositors and holders of unpaid drafts? Would he not include in such settlement, the stockholders and all creditors of the bank of every character whatsoever? Counsel concede in their answer that the Dexter-Horton National Bank had a claim against the Fairbanks Banking Company in excess of $120,000.00. Would not Barnette have been interested in settling his liability on that claim? Stockholders have suffered a loss to the extent of many thousands of dollars by the failure of this bank, yet they are not referred to or benefited in any way by the trust deeds.

As a matter further indicating the intention of the parties not to be as contended by counsel, the attention of the court is invited to the fact that the

property referred to in the trust deeds is conveyed in trust for specific purposes and cannot be used for those purposes until all the assets of the bank have been exhausted. Barnette only agrees to become liable for "any deficit that may hereafter be ascertained as between the amounts due to such depositors and owners of unpaid drafts * * * and the amount realized out of the *property and assets of the bank* and paid to such creditors." The claims of the bank against its faithless officers for the injury resulting to it out of their misconduct complained of, is an asset in the hands of the receiver, and under the express provision of the trust deeds above quoted, that asset must be collected in before any of the trust property can be used.

According to the decisions relied upon by counsel, there is nothing in evidence to show that the trust deeds were accepted in satisfaction of any claim against Barnette. Under those authorities, such satisfaction "*should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such purpose.*"

The mere possibility of acceptance for such purpose will not do; even the probability will not sustain the defense pleaded. Counsel have not pointed out any "express agreement to that effect" nor "any unequivocal act evidencing such purpose."

Why should the acceptance of these trust deeds redound to the sole benefit of these defendants, as

claimed? Why should the money in the hands of the receiver, arising out of the rents and profits of the Alaska property, be applied to the payment of judgment herein appealed from? What is there in the trust deeds that unequivocably evidences such a purpose? These judgments appealed from aggregate $54,720.00. The receiver herein has appealed from the refusal of the lower court to grant him additional judgments aggregating approximately $154,000.00, growing out of the mismanagement of these defendants of the affairs of said bank, and which appeals are now pending in this court, entitled *Noyes* v. *Wood*, numbers 2593, 2594. Why should the $50,000.00, claimed to be in the hands of the receiver as such rents and profits, be applied in one series of claims and for the benefit of these particular defendants to the exclusion of those affected by the claims involved in the appeals referred to? There is no such unequivocal intention evidenced by the trust deeds.

In so far as the trust deeds were covenants not to sue, they were covenants not to sue *before November 18, 1914*. Not to sue for what? On what cause of action against Barnette? Most likely, on the one arising out of the particular character of the obligation or liability in the mind of the parties at the time. The trust deeds speak of Barnette's obligation to depositors and owners of unpaid drafts, and refer to the Receivers being about to bring an action based on the liability of Barnette to said creditors arising out of

his management of the affairs of the bank. What kind of an "obligation," what kind of a "liability," was in contemplation of the parties? Was it in tort or in contract? If in tort, was it single or joint? If joint, was it in connection with these defendants? There is absolutely nothing in the record from which an answer to these questions can be made. If the construction of defendants prevails, it is a forced one; one that does not naturally and plainly arise out of the instruments. One that compels a concession on the part of Barnette, when he plainly refrained from making, namely, that he had been guilty of wrong doing which resulted in injury to the depositors and holders of unpaid drafts. If such had been his purpose, or what was in the minds of the parties, how easy it would have been to say so. Barnette would have wanted it clearly expressed for his own protection, because so long as his tort liability is open to be asserted against him, he would be in danger of suit to enforce it.

Whether there was a consideration for the trust deeds does not concern the Receiver in this action. That is for these defendants to prove. If the trust deeds should fail as a defense unless some consideration is imported to them, is no argument for implying a consideration. The so-called promise of Barnette, if a promise at all in respect to the injuries complained of, was no consideration. By it, he simply agreed to do that which he was already bound to do. Its language shows that it was not made in settle-

ment of the injuries herein complained of. It relates solely to "*any deficit that may hereafter be ascertained as between the amounts due to such depositors and owners of unpaid drafts * * * and the amount realized out of the property and assets of the said bank.*" If the contention of defendants shall prevail, then the only sum due for injuries is the amount of the judgments herein or $54,720.00; but the deficit Barnette obligates himself to pay exceeds that amount by over $425,000.00. Would anyone contend that, upon payment of these judgments for $54,720.00, the Barnette trust deeds were discharged? Such must be the result if the deficit referred to therein is measured by or relates to the injury suffered through misconduct of the bank's officers.

There never was a covenant not to sue Barnette. At the very most, the acceptance of the trust deeds operated as a covenant not to sue him *before November 18, 1914.* When that date passed, Barnette was and is subject to suit. The argument of counsel on this point is predicated upon the assumption that there was a perpetual covenant not to sue Barnette, which assumption has no foundation in fact. The very fact that the trust deeds operated to stay the right to sue only for a brief time is the strongest kind of basis for the presumption that there was no intention to release Barnette from liability on the matters in the minds of the parties at the time the trust deeds were accepted, and that there was no satisfaction of the claims of the Receivers against him, whatever

may have been their nature or character as asserted by them. Hence the Receivers did not accept the promise of Barnette as a satisfaction of their claims, as contended by counsel, but only as the price paid by him for his peace until November 18, 1914. When that date came and Barnette's promise was unfulfilled, the bar lifted and he became subject to suit.

The nub of this whole controversy lies in the fact that the Receiver is not permitted under the terms of these trust deeds, to apply the property conveyed to the satisfaction of the claims of depositors and holders of unpaid drafts prior to November 18, 1914, and then only upon the deficit existing between the amount of such claims and the amount realized out of the property and assets of said bank. How could such a conveyance operate as a release or satisfaction of the claims of the bank against these defendants which claims are a part of the very assets that must be first collected and applied to determine the deficit remaining and for which the trust property is liable? How could there be a satisfaction in full or *pro tanto* when the property received can not be enjoyed by the acceptor? I concede that there can be but one satisfaction for the wrong done; but in this case the property contended to have been received in satisfaction becomes available only when, and not until, all the assets of the bank have been exhausted, and these claims now being prosecuted are a part of t h o s e assets.

There is a further reason why the trust deeds cannot be given the effect contended for by appellees. They are not absolute conveyances in settlement of liability; but are purely conditional and the rights of the Receiver therein might be defeated by contingencies. It was only in the event that the claims of depositors and holders of unpaid drafts should not be satisfied, either out of the property and assets of the bank, *or otherwise*, or have been paid and satisfied by Barnette, by the 18th day of November, 1914, that the trust property could be resorted to, and then only such part thereof as may be needed to extinguish said deficit, the surplus being returned to Barnette. By reason of this condition, a situation m i g h t arise whereby the entire property should be returned to him. It only became the property of the receivers on condition that some one else, or some other property, did not satisfy said claims. Such an agreement is neither a release nor satisfaction *pro tanto*.

In *Musolf* v. *Electric Co.*, (Minn.) 122 N. W. 499, suit was brought for injuries resulting in the death of deceased. While in the employ of a telephone company, he was killed through contact with a heavily charged wire of defendant. For death by wrongful act, the statute limited r e c o v e r y to $5000.00. Plaintiff recovered a judgment against defendant for the full amount of $5000.00, which was affirmed. Defendant plead an agreement previously entered into between plaintiff and the telephone company by which plaintiff covenanted not to sue the

telephone company in consideration of the payment to her of $1000.00 by it. This release contained a clause that in case, in an action against the present defendant, the court should hold that no cause of action existed against such defendant, then plaintiff might remit the $1000.00 to the telephone company and thereafter commence an action against it. The court said:

> " In the case at bar the statute limited the amount of recovery to $5000.00. The agreement as has been pointed out, was not a release at all, but an optional covenant not to sue. The agreement was not in the nature of a receipt, of an accord and satisfaction, or of a settlement of a claim, in whole or in part. It excluded the idea of satisfaction, either partial or entire. It was expressly conditional."

It is respectfully submitted that there was no acceptance of the trust deeds as satisfaction in whole, or *pro tanto*, of the bank's claims against the defendants herein sued on, and that the decree of the lower court rendering judgment against the defendants for declaring and paying the dividend and accepting stock surrenders should be affirmed.

Respectfully submitted,

O. L. RIDER,

Attorney for Appellee.

No. 2528.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation,

Appellee.

Appellants' Supplementary Brief.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
Of Counsel.

The James H. Barry Co.
San Francisco

No. 2528.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation,

Appellee.

APPELLANTS' SUPPLEMENTARY BRIEF.

In accordance with the permission granted us by the Court, we beg to call its attention to the following matters discussed in appellee's brief:

Counsel says:

> "Appellants do not bring the entire decree here for review, but only such portions thereof as are unfavorable to them. Neither do they bring up

> the entire record in the case, but only such portions thereof as pertain to the portions of the decree appealed from."

It will be seen by reference to the record (p. 1055), that the evidence which has been brought up, is all of the evidence referring to the following matters:

1. The subscription for, taking over and cancellation of stock of said Fairbanks Banking Company by the corporation and the directors thereof, except as to the stock of Strandberg Brothers, B. E. Johnson, Emma Strandberg and John L. McGinn.

2. The declaration of the dividend by the directors of said Fairbanks Banking Company, and the payment thereof.

3. The accord and satisfaction.

4. Payment by the rents, issues and profits received and derived from the property of said E. T. Barnette and Isabelle Barnette and by the property deeded by them to the receivers.

> "One of the charges of the complaint," says counsel, "was that the directors paid the partnership, to which the corporation bank was successor, too much for the capital stock of the Gold Bar Lumber Company. The lower court found that the evidence was not sufficient to sustain the plaintiff on this item. It therefore passes out of this appeal and the evidence bearing on the same is not included in the above order allowing and settling the bill of exceptions. Nevertheless, appel-

> lants devote eight pages of their brief to a discussion of the proposition that 'The directors were entitled to take Gold Bar stock at its book value.' "

Counsel is mistaken as to the purpose of our discussion of the evidence in question, as well as to the fact of its inclusion in the record. The evidence of the value of the Gold Bar stock does appear in the record in many places and was included, not in support of the finding referred to by counsel, but as being pertinent to the question whether the directors were justified in believing that the bank had a surplus out of which it could declare a dividend.

Appellee says:

> "Counsel for appellants seem to have considered this case as a creditors' bill, and hence only rights existing strictly in favor of creditors against the officers and directors of a corporation can be enforced. In this they have misconceived the nature of the suit. It is a suit brought by a receiver of an insolvent bank against officers and directors, not to enforce the limited rights of creditors in the limited way such rights are enforced, but to enforce the claims of the bank against its faithless officers and directors for the injury done the bank."

There are some acts of misconduct the bank would have a right to take advantage of, some which a stockholder would have a right to take advantage of, and some of which the State alone would have a right to take advantage, but these three classes do not coincide. While it is said in some of the cases that the

claims of the bank against its directors and officers for mismanagement are assets of the bank, it will be found upon examination of the cases that the authority of the receiver to bring such action for the benefit of stockholders or creditors, in general, is founded upon some expressed statutory provision.

We will reply to the argument of counsel for the appellee as to those points which he presents in his reply brief in the order in which he discusses them.

I.

MULTIFARIOUSNESS.

Counsel says:

> "The complaint presents but one cause of action, the recovery of the bank's funds which have been diverted by the bank's trustees. It makes no difference that all the diversions did not occur at one time, or through the acts and conduct of one particular group of defendants. The defendants during the respective terms of their office were its directors, charged with the duties of quasi trustees in the management and control of its property as an entirety. That trust as to it was at all times impressed upon the property. . . . While the different breaches may have been separate and distinct one from the other, nevertheless each and all operated upon the single trust fund, depleted it here and there and broke it into fragments of which each took its respective part for the respective times. . . . The receiver by following this property and enforcing this trust presents a

single issue and one point of litigation in which all these defendants are interested."

Most of the authorities cited on page 8 of appellee's brief have no bearing upon this question of multifariousness. Most of them deal with the question of whether or not the claims against directors and officers for wrongful acts or mismanagement, are the proper subject of action by creditors or by the receiver. Most of them arise under the following sections of the National Bank Act.

Section 5239, which provides:

> "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. . . . And in cases of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

and Section 5204, which provides:

> "No association or any member thereof shall during the time it shall continue its banking operations withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital."

It is held under these sections that losses caused by mismanagement by the directors are recoverable by a receiver appointed under the National Bank Act.

Reviewing the cases cited by appellee:

Brown v. *Schleier,* 118 Fed., 981, was an action brought by a receiver of a National Bank against a lessee of the bank's property to declare the lease void as having been *ultra vires.* The court said:

> "The receiver is one who was appointed by the comptroller under Section 5234 of the Revised Statutes to liquidate the affairs of the bank, it having become insolvent. As such receiver he is vested with all the rights of creditors, and may doubtless challenge any wrongful act which the creditors could challenge and maintain such suits against third parties, including actions against directors and stockholders of the bank on account of wrongful and fraudulent acts as the corporation might maintain."

All this is dicta, for the court goes on to say:

> "But we think that in virtue of his office as receiver he is not authorized to *challenge or impeach an executed transaction* between the bank and a third party like the one now in hand and which though known to the United States through its proper officials at the time it was undertaken and consummated, and while the excessive investment of its funds was being made was neither arrested nor complained of by the United States or any creditor or stockholder of the bank."

Sargent v. *American Bank,* 154 Pac., 761, was an action by the Oregon Superintendent of Banks whose duties and rights are "analogous to those of the receiver of a national bank or trustee in bankruptcy under Federal Statutes."

McTamany v. *Day* (Idaho), 128 Pac., 563, was an action by a judgment creditor against directors and stockholders for dividends received and other wrongful acts.

It was held that the action could not be maintained, as the right of action was in the receiver.

Bailey v. *Mosher,* 63 Fed., 488, was an action by a creditor against the directors of an insolvent *National* Bank to enforce personal liability under Section 5239, Rev. Stat. It was held that the right of action was in the receiver, the liability being an asset.

Yates v. *Jones National Bank,* 105 N. W., 287, and *Cockrill* v. *Abeles,* 86 Fed., 505, also rose under the National Bank Act.

Counsel attempts to reply to our contention that the complaint in this action is in direct violation of the Alaska Statute in relation to joinder of actions, by contending: First, that the Act of Congress creating the Alaskan Code was in effect repealed by the Equity Rules of the Supreme Court. This position needs but the mere statement of it to constitute its own refutation. Second, that the decisions of the Federal Courts are controlling in this case in determining what is multifariousness. This position also proceeds upon

the assumption that the Federal Statute regulating practice in the Alaska Courts is not binding upon this Court. Third, that the decisions of the Federal Courts and many of the State Courts hold that a complaint like the one herein presents but *one cause of action.*

We have examined the cases cited by counsel in support of this view and fail to find a single one that sustains him. Many of them hold that under the facts set up the bills were not multifarious, and, of course, a bill may set up distinct causes of action in many circumstances and not be multifarious. None of the cases, however, go so far as to hold that a complaint like the one here presents but *one cause of action,* which is the point appellee seeks to establish in order to get around his violation of the Alaska Statute. Let us review the authorities cited by him:

Heckman v. *U. S.,* 224 U. S., 413, was a bill filed by the United States to cancel conveyances by Indian allottees on the ground that they were in violation of existing restrictions upon the power of alienation. It was held that the bill was not open to the objection of multifariousness or misjoinder, because the suit involved a large number of separate conveyances by individual Indian allottees to distinct grantees made parties defendant, the Court saying:

> "A further objection is that the bill is multifarious. But in view of the numerous transfers which the Government attacks, it was manifestly in the interest of the convenient administration

> of justice that unnecessary suits should be avoided, and that transactions presenting the same question for determination should be grouped in a single proceeding. The objection to the misjoinder of causes of action is likewise without merit."

Mullen v. *U. S.,* 224 U. S., 448, was likewise a bill filed by the United States to cancel conveyances by heirs of Indian allottees on the ground that they were in violation of existing restrictions against the power of alienation. It was held that the bill was not open to the objection of multifariousness or misjoinder, because the suit involved a number of separate conveyances by individual Indians to distinct grantees made parties defendant.

Graves v. *Ashburn,* 215 U. S., 331, was a bill to cancel a deed for fraud. The bill charged a *conspiracy* among several trespassers and trespassees, extending over the greater part of four contiguous lots. It was held that the objection of multifariousness would not prevail.

U. S. v. *American Bell Telephone Co.,* 128 U. S., 315, was a bill praying for the cancellation of two patents issued at different times. It was held that it was not multifarious, because both patents were issued to the same person and held by one defendant, related to the same subject and the later was for an improvement upon the invention in the earlier one.

Brown v. *Safe Deposit Co.,* 128 U. S., 403, was an action brought by creditors to enforce judgment

against a corporation. Brown was made a defendant, it being alleged that he was asserting a vendor's lien on some of the property transferred by the vendor to the company. A mortgagee of the company's property filed a cross-bill alleging that Brown had entered into contracts to convey the property upon payment of the price to the company's vendor, and that the latter's right and interest had been transferred to the company and by it mortgaged. He prayed for the specific performance of Brown's contract and for a foreclosure of the mortgage and accounting. It was held that the cross-bill was not multifiarious.

In the case of *Harrison* v. *Perea,* 168 U. S., 311, which was an action to recover possession of an estate, a cross-bill was filed, and it was held *to be* multifarious, because the matters therein set up were not connected with the issues raised by the original bill.

Heyden v. *Thompson,* 71 Fed., 60, was an action by the receiver of a National Bank against its shareholders to recover dividends unlawfully paid to them out of the capital at times when the bank had earned no net profits and was insolvent. It was held that the fact that some of the defendants participated in but one or two of the sixteen dividends on which the suit was based, that others participated in more, and others in all of the dividends, did not render the bill multifarious.

Kelley v. *Boettcher,* 85 Fed., 55, was a suit in which it was sought as against one of the defendants to can-

cel a deed for an interest in a mine, and as against such defendant and two others to recover the proceeds of ore extracted from such mine. It was held that the bill was not demurrable for misjoinder, since it alleged that all of the defendants joined in employing an agent, who by false representations and concealments procured the deed which it was the main purpose of the suit to set aside.

Curran v. *Campian,* 85 Fed., 67, was a case similar to *Kelley* v. *Boettcher, supra,* and arose out of and affected the same property. On the authority of that case it was held that the bill was not multifarious.

Cockrill v. *Cooper,* 86 Fed., 7, was an action by a receiver of a National Bank against the directors for misconduct. The question whether the bill was multifarious or not was not presented.

Wyman v. *Bowman,* 127 Fed., 257, was an action to collect unpaid subscriptions of nine defendants. The question was whether the jurisdiction of equity could be invoked to avoid a multiplicity of suits. The question of multifariousness in the pleading was not raised.

Boyd v. *Schneider,* 131 Fed., 223, was an action by a depositor of a National Bank of Illinois on behalf of himself and of others who might join him, against the directors of the Bank to recover losses to the assets of the Bank alleged to have been brought about by the negligence and misconduct of the defendants. It was held that in as much as the right of each depositor

to recover was based upon the same theory, the bill was not multifarious.

In *U. S.* v. *Allen,* 179 Fed., 13, it was held that a bill filed by the United States to cancel some 4000 conveyances made by individual Indian allottees to the several defendants was invalid, because made in violation of the statute imposing restrictions upon the alienation of the land of the Indians, is not multifarious.

Benson v. *Keller,* 60 Pac., 218, was a suit to cancel certain due bills alleged to have been fraudulently procured, and it was held that the bill was not multifarious, because of the joinder of two defendants to whom different bills had been assigned as collateral security.

Not a single case cited attempts to hold that a bill similar to the one in this suit *states a single cause of action.* As the Supreme Court of the United States said in the well known case of *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.,* 171 U. S., 55:

> "It must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. . . . We make these observations, because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the vir-

tues which are claimed for them, and if so it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, What is equity? but, What saith the statute?"

II.

THE FAILURE TO PLEAD THE CORPORATION LAW OF NEVADA.

We respectfully submit that the appellee has not made a fair answer to our contention in this regard. He calls the Court's attention to the fact that he alleges in his complaint that, "there were no net profits on hand out of which said dividends could be *legally* paid"; "that said corporation wrongfully and *unlawfully* began to reduce its issued capital stock"; "that the wrongful, *unlawful,* fraudulent and negligent acts and conduct of the defendants were the proximate cause"; "that by reason of said wrongful, *unlawful* and negligent acts, etc."

He says:

> "Reverting now to the claim that the allegations of the complaint are not sufficient to charge a statutory liability under the Nevada Corporation Law, because said law is not specifically pleaded, we find it is charged that said dividend was not declared and paid out of, nor said stock purchases made with, the surplus, undivided profits or earnings of the bank . . . that such acts and conduct were *unlawful* and could not be *legally* done."

It is, of course, elementary that "unlawful," "illegal" and the like are mere words stating conclusions. If it were necessary to prove the Nevada Law, it was certainly necessary to allege it, and *without the allegation the face of the complaint failed to show a cause of action* in this regard. It was not necessary to raise it by demurrer, as the failure to state a cause of action, of course, could be taken advantage of at any stage of the proceeding.

> "Although defendant pleaded over, after the overruling of its demurrer to the declaration, went to trial, and failed to renew the demurrer, or ask for verdict under all the evidence at the close of the case, the sufficiency of the declaration to state a cause of action may be reviewed as an unassigned error appearing on the record."

Mound Coal Co. v. *Jeffrey Mfg. Co.,* 233 Fed., 913;
Teal v. *Walker,* 111 U. S., 242;
Lehnen v. *Dickson,* 148 U. S., 71.

Even had defendants failed to demur, they would not have waived the point, for Section 894 of the Compiled Laws of Alaska provides:

> "If no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same excepting only the objection to the jurisdiction of the Court and *the objection that the complaint does not state facts sufficient to constitute a cause of action.*"

The fact that there were several causes of action mingled together in the complaint, some of which involved a liability founded upon the Nevada statute, and others of which involved a purely common law liability, made it impossible to attack the complaint as a whole by general demurrer, and so raise the question of the failure to plead the Nevada statute. Had, however, the different causes of action been separately stated, as required by the Alaska statute, it would have been possible to have presented this question directly by demurrer to such of the counts as did involve the Nevada statute.

This certainly emphasizes the virtue of enforcing the statute requiring the separate statement of the various causes of action.

The fact that the defendants offered in evidence portions of the law of Nevada in attempting to rebut evidence introduced by the plaintiff, could not amount to an estoppel or waiver upon their part, nor was it necessary to reserve any exception to the action of the Court in admitting the evidence, for the question could always be raised, as here, upon the judgment roll.

III.

THE LIABILITY FOR DECLARING THE DIVIDEND.

Before the directors could be held liable for payment of the dividend, it was necessary to find, not only that there was no surplus, but also that they knew it, or had reason to know it. This point we have fully covered in our opening brief—see Appellant's Brief (pp. 104 *et seq.*).

This fact was neither proven nor found. It was essential if there was to be any recovery against the directors on the ground of any so-called common-law liability.

This leaves the dividend open to question only on the other ground urged "that it was in violation of the law of Nevada."

To which we come back again with our answer, "The law of Nevada is not pleaded or found."

In attempting to show that there was no surplus out of which the dividend of April 12th, 1910, could be declared, appellee relies upon the fact (p. 19) that on that day the bank was carrying as assets the following:

Gold Bar Lumber Co. stock.....	$341,949.00
Washington-Alaska Bank of Washington stock	250,000.00
Paper then past due and still unpaid..	111,243.51

On his own admission (p. 2) he is not in a position to question this valuation of the Gold Bar Lum-

ber Company stock. As to the valuation of the Washington-Alaska Bank of Washington stock, the evidence was as follows:

The witness Parsons, who was Vice-President and General Manager of the Washington-Alaska Bank testified:

"Q. Do you remember about what the amount of your deposits was at that time?

"A. To which time do you refer?

"Q. At the time of the sale to the Fairbanks Banking Company.

"A. If I recall correctly, somewhere in the neighborhood of *$1,900,000;* it may have been a little more or a little less—somewhere in that neighborhood.

"Q. Do you remember about what the amount of your loans and discounts was?

"A. A little less than $300,000, if I remember correctly.

"Q. About what per cent. of cash did you have on hand?

"A. Do you mean cash or do you mean reserves—cash and exchange?

"Q. Cash and exchange.

"A. We had, at the time we sold, in excess of ninety per cent. of cash and exchange.

"Q. What do you mean by cash and exchange?

"A. I mean cash in our vaults and cash in other banks on the outside with our correspondents.

"Q. What had been the earning capacity of that bank from the time of its organization in 1905 up to the time of the sale, each year, approximately?

"A. Oh, I think our average earning power was somewhere in the neighborhood of *$50,000* a year.

"Q. This statement shows that upon the 13th day of September, 1909, that the loans and discounts amounted to the sum of $258,545.35, that is about correct?

"A. That is taken from the books at that time? (pp. 557-558).

"Q. At that time.

"A. Then it must be correct."

The witness Barbour, who was cashier of the Washington-Alaska Bank, testified:

"Q. Do you know what the earning capacity of that bank was during the years 1905-6-7-8 and up to September of 1909?

"A. Yes, sir, I do.

"Q. Will you state approximately what they were per year?

"A. Well, I don't know—I have not ever figured it, but the *capital and surplus and profits* as shown by the statement of September (I think it was something like from two hundred and eighteen to two hundred and twenty-five thousand)—you might say nearly all profits from the business.

"Q. But there had been dividends declared.

"A. There had been *dividends* on approximately one hundred per cent. of the capital declared at the end of the first year (p. 637).

"Q. Do you know the amount that the Fairbanks Banking Company paid for the Washington-Alaska Bank?

"A. $250,000.

"Q. I will ask you to state whether, in your opinion, with the knowledge of the conditions of the Washington-Alaska Bank and the amount of business that they had done and their condition at that time, the sum of $250,000 was a fair, reason-

able and conservative price for the Washington-Alaska Bank?

"A. I think the price was *very low*" (p. 638).

It is not too much to say that the good will of a bank with a capital of $150,000.00 and surplus of $56,000, which is paying annual dividends of $50,000 and which has been doing so for some years past, is worth $75,000.00, and if such were the case the bank was entitled to include that good will in the valuation of the stock in carrying it on its books.

> "When the stock of a corporation has been issued for the good will of several separate establishments, and is claimed that the value thereof has depreciated, the court cannot determine that it has, in the absence of positive evidence of the value of such good will at the time of the issue of the stock and at a later time, and the fact that some of the establishments have been closed while their customers are supplied by the product of other establishments does not prove a depreciation."
>
> *Washburn* v. *National Wall Paper Co.*, 81 Fed., 17.

With regard to this $111,243.51 of past due paper, of which $69,908.94 was paper that had been received from the partnership in March, 1908, we refer to page 113 *et seq.* and 131 *et seq.* of our opening brief.

Upon the proposition "That the defendants are liable for declaring and paying the dividend under the

evidence and the facts found by the Court," the appellee cites the following:

Siegman v. *Elec. Veh. Co.* (N. J.), 65 Atl., 910, which was decided under a New Jersey statute which forbade *a corporation* to make dividends except from the surplus or net profits arising from its business, etc., and made the directors liable to the corporation unless they caused their dissent to be entered in the minutes and published in a newspaper.

Coleman v. *Booth* (Mo.), 186 S. W., 1021, was a case of actual fraud where the directors inflated the assets by increasing the book value of the good will and thus created an apparent surplus out of which they declared the dividends in question.

E. L. Moore Co. v. *Murchison,* 226 Fed., 679, was an action by a trustee in bankruptcy of a corporation against its directors and officers to recover dividends illegally paid. The Court said "It is well settled that, " when directors declare a dividend in good faith, " and without negligence, they are not to be held " liable merely because the dividend turns out to have " impaired the capital stock," but holding under the facts in the case, that the directors ought to have known that the dividends had not been earned.

Briggs v. *Spaulding,* 141 U. S., 132, 35 L. Ed., 662, was an action brought against directors of a national bank for injuries growing out of their negligent mismanagement. Judgment went in favor of the directors, which was sustained on appeal.

Cottrell v. *Mfg. Co.,* 126 N. Y. S., 1070, was an action to recover from a stockholder dividend paid to him out of the capital, he knowing such to be the case. The Court says, "The Courts have sometimes "refused to apply this rule when either the directors "or stockholders, or both, have made and received "the dividend in good faith."

Cooper v. *Hill,* 36 C. C. A., 402; 94 Fed., 582, was an action as already stated, to recover from directors moneys of the bank spent by them in prospecting a mine which they had taken over for a debt. There was no question of dividend involved.

Cockrill v. *Cooper,* 29 C. C. A., 529; 86 Fed., 7, is a case arising out of the National Bank Act and governed by its provisions.

IV.

LIABILITY FOR STOCK PURCHASES.

The liability of the directors for the surrender of the stock again is predicated entirely upon the unpleaded Nevada law.

And except in one or two instances there is no finding that the acts were knowingly done. The finding is that they were acquiesced in (Finding 54), whether before or after the fact does not appear.

Maryland Trust Co. v. *Bank* (Md.), 63 Atl., 70, is against the weight of authority in holding that a provision of the Articles of Incorporation authorizing

the dealing in stocks does not include dealing in the corporation's own stock.

Cooper v. *Hill,* 94 Fed., 582, is cited as authority for the proposition that if the Articles did authorize the purchase of its stock for the bank, the same would be void because in conflict with the (unpleaded) statute of Nevada under which the bank was incorporated. This was an action by the receiver of an insolvent National Bank against the directors for money expended by them in operating and prospecting a mine which the bank had taken for a debt. No question of stock purchase or surrender was involved.

In regard to one stock purchase, at least that of the Wood stock, there was the further defense that the executed contract could not be impeached.

In *Weber* v. *Spokane National Bank* 64 Fed., 210, it was said:

> "Is the inhibited debt void, and may the banking association retain the property which it acquires under such circumstances, and deny its liability for the stipulated consideration? We find no reported decision of this question, but certain other sections of the statutes defining the powers of national banking associations, and prohibiting them from doing certain specified acts, have been the subject of adjudication. The tendency of all the decisions has been to refer to the general government the power to deal with all violations of the act, and to hold that acts done without the scope of the prescribed powers of the bank, or in violation of the express terms of the statute for their guidance, are not void, but are viodable only,

Thus section 5136, by implication, prohibits a national bank from loaning money upon real estate security; yet it is held that a mortgage taken upon real estate to secure a contemporaneous loan or future advances is not void, but merely voidable, at the instance of the government. *Bank* v. *Matthews,* 98 U. S., 621; *Bank* v. *Whitney,* 103 U. S., 99. Section 5201 expressly prohibits a loan by a national bank upon the pledge of its own shares; but it has been held that, if the prohibition could be urged against the validity of a transaction by any one except the government, *it could only be done before the contract was executed,* and while the security remained pledged, and that the illegality of the transaction would not render the bank liable to the pledger for the payment to him of the money realized upon the sale of the security. *Bank* v. *Stewart,* 107 U. S., 676, 2 Sup. Ct., 778. Section 5200 provides that no bank shall loan to one person or firm an amount to exceed one-tenth of its actually-paid capital stock; but it is held that, if a greater sum is loaned than is allowed by this section, that fact may not be set up in defense to an action for recovery of the money so loaned (*Gold Min. Co.* v. *National Bank,* 96 U. S., 640), and that the statute was intended as a rule for the government of the bank, and did not render the loan void (*O'Hare* v. *Bank,* 77 Pa. St., 96; *Pangborn* v. *Westlake,* 36 Iowa, 546). We think the reasoning upon which these conclusions are reached is applicable to the case before the court. We hold, therefore, that an indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by the statute, or is even incurred in violation of the positive prohibition of the law in that regard."

In regard to the Wood stock, it was argued in No. 2594, to which we may as well refer here, that the corporation received nothing when it received this stock, for the reason that it was of no value as the assets transferred from the partnership were so inflated in value that the corporation was insolvent from its birth.

In this connection we would call the Court's attention to the testimony of Sidney Stewart, the receiver's principal witness:

> "Q. I would like to ask you to refer to the book called the Daily Statement of the *29th day of August, 1908.*
> "A. Yes, sir (opens book).
> "Q. I wish you would take a paper and a pencil, and I will ask you to write down the amount that was due the Fairbanks Banking Company from the Bank of British North America on that date.
> "A. $3,132.27.
> "Q. How much was due this bank from the First National Bank of San Francisco?
> "A. $2,052.40.
> "Q. And the National Park Bank of New York?
> "A. $17.66.
> "Q. And the Seattle National Bank?
> "A. $714.86.
> "Q. Valdez Bank and Mercantile Company?
> "A. $791.78.
> "Q. Dexter-Horton?
> "A. $400,107.39.
> "Q. Sundry Banks?
> "A. $100.

"Q. Bank of California, San Francisco?
"A. $985.21.
"Q. J. W. McCormick?
"A. $381.92.
"Q. Shepard Brothers and McBride?
"A. $45.94.
"Q. Cash on hand?
"A. $193,007.54.
"Q. Gold-dust on hand?
"A. $125,891.94.
"Q. Can you figure that up and give me the total?
"A. $727,228.91.
"Q. Now, I would ask you to refer to the amount due depositors. They kept two accounts there, didn't they? Ordinary and savings accounts?
"A. Yes, sir.
"Q. How much was due to ordinary depositors?
"A. $660,519.41.
"Q. How much was due the savings account?
"A. $37,305.03.
"Q. How much was due the depositors of the Cleary Branch?
"A. Due to Cleary Branch $59,186.41.
"Q. And the Dome City Bank, being a branch bank?
"A. $425.37.
"Q. J. P. McCrosky, agent?
"A. $1523.92.
"Q. Alaska Bank, Nome?
"A. $1095.74.
"Q. Outstanding scrip?
"A. $390.00.
"Q. Old Bank collections; not the interest, just the collections?
"A. $2,378.54.

"Q. I will ask you to state whether or not those were all the demand liabilities that existed on that date, except the Dexter-Horton matter?

"A. Except the Dexter-Horton $200,000?

"Q. Yes, sir?

"A. And the Barnette special deposit.

"Q. That was not due at that time, I mean, on demand; and excepting the savings, which was not a demand either.

"A. The Scandinavian-American Bank.

"Q. That is a disputed account, is it not?

"A. I don't know what the dispute was at that time.

"Q. What is the amount of it?

"A. $9,746.19.

"Q. Leaving that out, is there anything else there?

"A. The capital stock liability.

"Q. Just figure up what you have there?

"A. $762,824.42, I make it.

"Q. Did you know who J. W. McCormick was?

"A. Yes, sir.

"Q. He was the agent of the bank, buying gold-dust?

"A. I presume that is what this is intended for.

"Q. Shepard Brothers & McBride acted as agents for the bank out on Fairbanks Creek?

"A. I don't know them.

"Q. Those items such as, due from Bank of British North America, First National Bank, etc., are all available cash. You know that?

"A. What?

"Q. That is available cash, money on deposit in other banks; that is considered available cash?

"A. That is considered available, yes, sir.

"Q. Ready for instant use?

"A. Yes, sir.

"Q. I will ask you to state what the difference is between the amount of cash and gold-dust that was available to the bank upon that day, and the amount of its then demand obligations, as you have read them out here.

"A. The liabilities exceed these assets in these figures to the extent of $35,595.51.

"Q. In other words, the Fairbanks Banking Company, upon the *29th day of August, 1908,* had sufficient money to pay all of their depositors —sufficient money on hand to pay all of their depositors, with the exception of about $35,595.51. Isn't that true?

"A. That is what this figures out, from these figures.

"Q. There can't be any mistake about those figures?

A. No, sir, that is what the book shows.

"MR. RIDER: You mean the depositors you have listed?

"MR. McGINN: A. The depositors here; also due depositors at the Bank of Cleary, depositors of the Dome City Bank, J. J. McCormick, the agent of the bank, Alaska Bank at Nome; what was due them; also outstanding scrip $390; old bank collections amounting to $2,378. What other liabilities did the bank have on that date, not including the capital stock and not including the Scandinavian-American bank?

"A. E. T. Barnette special, deposit $200,000, and the bills payable $200,000.

"Q. What do you mean by 'bills payable'?

"A. That I believe was the Dexter-Horton.

"Q. What else?

"A. The old bank interest $39,000.

"Q. That was not due at that time, was it? Well, put it down. Anything else?

"A. $483.59.

"Q. That covers all the liabilities except the capital stock?

"A. Yes, sir.

"Q. What does that amount to?

"A. The outstanding capital stock?

"Q. No. What is the total of those items that you have there?

"A. The total of these items is $439,483.59.

"Q. What were your loans and discounts upon that date?

"A. $282,836.81.

"Q. What was your real estate?

"A. $26,817.63.

"Q. Gold Bar stock?

"A. $341,949.

"Q. Can you tell approximately what amount of interest was then due to the bank which had not yet been collected?

"A. No, I cannot.

"Q. Can you tell whether or not that would about offset that item of $39,000?

"A. That is a pretty hard matter to give for me.

"Q. Could you tell whether it would be ten, twenty or thirty thousand dollars?

"A. It would be a mere guess.

"Q. You have no means of telling?

"A. No, sir.

"Q. What does that figure up? That is everything there is, is it?

"A. $651,603.44.

"Q. The total liabilities were $439,483.59, were they not?

"A. Those were those four items.

"Q. What is the difference between those items?

"A. $212,119.85.

"Q. How much was the capital stock upon that date?

"A. $300,000.

"Q. How much paid up; I mean, subscribed stock, outstanding stock?

"A. $188,200.

"Q. What is the difference between the surplus and the outstanding stock?

"A. The difference between the $199,000 and the $212,000?

"Q. Yes.

"A. $23,919.85.

"Q. That does not include any interest that was then due?

"A. No, sir.

"Q. So, then, you say that the Fairbanks Banking Company upon the *29th day of August,* according to their books, had sufficient money to pay all of their depositors and what was due to banks, with the exception of about $35,000; that is, they had cash in hand practically?

"A. Well, it had that cash in hand sufficient to pay, excepting $35,000, those items I read there.

"Q. All their depositors, and what was due banks?

"A. Yes, sir, those items.

"Q. They had sufficient to pay, with the exception of $35,000?

"A. Yes, sir.

"Q. They owed Dexter-Horton at that time $200,000?

"A. Yes, sir.

"Q. But they had loans and discounts amounting to the sum of $282,000?

"A. Yes, sir.

"Q. So that their loans and discounts, if all but $82,000. of them were paid, would be sufficient to pay Dexter-Horton?

"A. Figuring that way, yes, sir.

"Q. They owed Barnette on a special account $200,000?

"A. That is correct.

"Q. They were carrying Gold Bar at $341,000?

"A. Yes, sir.

"Q. So, Gold Bar, ought to have been sufficient to pay Barnette?

"A. Yes.

"Q. Then they had the real estate here, and the interest that was still due, to pay the balance of the $35,000 that was due depositors that they didn't have sufficient money on hand to pay, isn't that true, on the surplus and the loans and discounts?

"A. And that interest that belonged to the old bank should be considered here, too.

"Q. You have got that included there?

"A. It is included in that $439,000 part of the liabilities there.

"Q. But I am asking you about the $35,000 that they lacked in cash to pay all of their depositors on that date and what was due to banks.

"A. Yes, sir.

"Q. They had their real estate here and interest on existing loans to pay that, didn't they, and the surplus in the profit and loss account?

"A. You figure that the loans would take care of the Dexter-Horton and Gold Bar take care of Barnette.

"Q. Gold Bar would certainly take care of Barnette?

"A. Yes.

"Q. And there was real estate and surplus enough to take care of the $35,000?

"A. Yes.

"Q. It would do that?

"A. Yes.

"Q. So that they had $82,000 loans and discounts that exceeded the claim of Dexter-Horton; they had the difference between the $341,000 which they were carrying Gold Bar for and the $200,000, to pay this $39,000 that was due the old institution and to pay the subscribers or stockholders for their stock?

"A. I think that would figure out about that way, on those figures.

"Q. As a matter of fact, it practically shows that they could pay every depositor on that day in full. Wasn't that the condition of the bank on the 29th day of August?

"A. Well, in my statement I have taken the statement just as they show it on this daily statement book.

"Q. According to the books. That is where you got all of your statements?

"A. Of course. I have not figured it the way you have figured it.

"Q. But you can't get away from those figures.

"A. I admit, if you were to figure that way, that (interrupted).

"Q. Figure it any way?

"A. I say; when I figured the other, these figures from these books was what was called for.

"Q. You didn't testify to this date, the 29th?

"A. I don't remember.

"Q. Do you know whether or not upon that date the depositors of the bank—or that there were depositors of the bank that owed the bank in the aggregate the sum of $35,000?

"A. That there were depositors that owed the bank?

"Q. Yes. Notes not due that they owed the bank at that particular time.

"A. I have never gone into that" (pp. 404-411).

So that it appears from the record that the assets of the bank were sufficient a few weeks after the Wood transaction to pay off all the depositors in cash, take care of the creditors and leave assets sufficient to redeem the stock at par.

As bearing on the good faith of this transaction, it should not be forgotten that Hill, who sold his interest at the same time with Wood, chose to take his share in stock of the new corporation, which he certainly would not have done had there been any belief on his part that the stock was without value.

V.

EXISTING CREDITORS.

Appellee says that it need not be shown that the creditors were such at the time the alleged wrongs were committed, and cites several cases in support of his position.

In *Hammon* v. *Taylor Rice Engineering Co.,* 84 Fed., 393, the question was not raised. In this case a promissory note was involved which was given by the corporation for the purchase price of some of its own capital stock. It was claimed that the receiver, as representing the corporation, was not entitled to present any defense which the corporation could not

have presented. The court, however, held that the receiver represented the creditors and had the right to assert any defense to which the creditors in contradistinction to the corporation might have been entitled. The question, however, as to whether the defense could have been raised by creditors who were not such at the time the note was given, was not raised.

North v. *Union S. & L. Assn.* (Oregon), 117 Pac., 822, was a suit by stockholders to compel the directors to account for assets which it was claimed the latter had absorbed. The question was discussed whether in an action of that kind the stockholders must show that they were such at the time of the commission of the act complained of, and the Court held that while the rule of the Federal Courts was that they must so show, it would not take that position itself.

In addition to the cases cited in our brief upon this proposition, we desire to refer to the case of *Coe* v. *East & West Railroad Company,* 52 Fed., 513. In that case, certain stockholders and directors of a railroad company, who owned a controlling interest therein, negotiated a contract between it and an iron company in which they were stockholders and directors, by which the railroad company leased certain property from the iron company and paid in stocks and bonds. Subsequently a consolidated mortgage was placed upon the property to secure a fur-

ther issue of bonds. It was held that even if the railroad company had been wronged or cheated, subsequent creditors, to-wit, the holders of the subsequent bonds and subsequent purchasers, had no right to question the transaction as long as the railroad company acquiesced and no intention to defraud subsequent creditors was shown.

VI.

THE BARNETTE DEEDS.

The question of the accord and satisfaction in whole or in part was fully gone into in our opening brief.

Our case rests entirely upon the written documents and the acts and conduct of the parties. The written documents include:

1. The Barnette petition.
2. The order of the court referring the matter to the receivers.
3. The petition of the receivers.
4. The order of the Court directing the receivers to accept the trust deeds.
5. The deed to the Alaska property.
6. The deed to the Mexican property.
7. The reply of the receiver herein.

The deeds recited "that the receivers are about to "commence an action for and on behalf of *creditors* "against E. T. Barnette to recover from him the

" amount of any deficiency that may be ascertained " as between the claims of the creditors above men- " tioned (depositors and holders of unpaid drafts) " and the amount realized out of the property and " assets of said bank; *said actions to be based on the* " *liability of said E. T. Barnette to said creditors,* " ARISING OUT OF HIS MANAGEMENT OF THE AFFAIRS " THEREOF."

These words show what was the subject matter of the accord, Barnette's liability to the creditors arising out of his management of the affairs of the bank. This liability covered at one point or other the liability of every defendant in this case.

The authorities hold as we showed in our opening brief that the intention of the parties may be ascertained from the surrounding circumstances.

There surely was some object or motive which inspired Barnette and his wife to execute the trust deeds, some consideration which induced them to those acts. We contend that that consideration appears from the transaction itself, from the fact that the suit was threatened against Barnette *based on his liability* to the creditors arising out of his management of the affairs of the bank. What purpose could he and his wife have had in transferring their property to the receivers unless upon the understanding that it was accepted wholly or partially in settlement of his liability? Otherwise, it was without purpose as far as they were concerned. If it was wholly or partially in

settlement of his liability, the other *tort-feasors* are entitled to the benefit of the settlement. The receiver in his reply says that the acceptance of the trust deeds operated as an agreement not to sue Barnette before Nov. 18, 1914. Why that particular date? Because that was the date when the new promise made by Barnette in the trust deeds would mature, the date when he expressly bound himself to pay off the deficit. The receivers said in their petition that if they accepted the trust deeds it would be "impracticable" to sue Barnette. There must have been some foundation for this statement or belief. Why would it have been "impracticable"? If the receivers took the trust deeds without any promise or understanding on their part, what could prevent their suing him? Their ability to sue was not impaired by the acquisition of property. They could have brought suit the next day upon all the various acts sued on in the case at bar, but for one thing—they had accepted Barnette's new promise contained in the trust deeds and that acceptance operated as an accord and satisfaction or, to use the language of the receivers' reply, "as an agreement not to sue" (p. 186).

Of course, the decisions hold that a covenant not to sue is no bar to an action against a *co-tort-feasor.* That would be true here had the parties stopped with a mere covenant not to sue. But they went farther. They entered into a new arrangement by which the receivers accepted a new promise from

Barnette, performance of which was secured by the hypothecation of his wife's property along with his own. It seems perfectly plain to us, that the receivers had put themselves in such a position that they were bound to rely on the contract evidenced by the trust deeds and had parted with the right to maintain any action against Barnette founded on the original torts.

Counsel asks (p. 50) "If Barnette was settling a tort liability, why should he settle it only as to depositors and holders of unpaid drafts? Would he not include in such settlement the stockholders and all creditors of the bank of every character whatsoever?"

We reply: Barnette was not settling a liability as to any particular class of creditors. He was settling his liability to the receivers by the payment of an amount arrived in a particular way, i. e., the deficit ascertained in the manner provided in the trust deeds (p. 1043). It was the measure adopted to fix the amount.

Appellee makes the point that Barnette only agreed to become liable for "any deficit that may be hereafter "ascertained as between the amounts due such de- "positors and holders of unpaid drafts— . . . "and the amount realized out of the property and "assets of the bank and paid to such creditors." And he says "The claim of the bank against its faith- "less officers . . . is an asset in the hands of the "receiver and under the express provisions of the

" trust deeds above quoted, that asset must be collected " in before any of the trust property can be used." *No such construction can be given to the word "assets" used in the trust deeds as to make it mean claims of the character just referred to. In the first place, the deeds of trust refer to the assets of the bank as being at that time in the hands of the receivers.* In the second place, the construction asked for would lead to an absurdity. For the liability of Barnette himself for his tortious acts would be an asset of the bank as much as that of any of the other officers and directors which would have had to be exhausted before the deficit could be ascertained. Such a construction is plainly a palpable absurdity.

Appellee asks "Why should the $50,000 claimed to be in the hands of the receiver as such rents and profits be applied in one series of claims and for the benefit of these particular defendants to the exclusion of those affected by the claims involved in the appeals referred to?"

In the first place the question is not pertinent in view of the fact that the Court found that the total liability of the directors from the organization of the bank until its close was approximately the sum of $50,000 which was the amount of the judgment rendered against Jesson who was a director during that entire period.

Second, suppose Barnette had made an agreement with the receiver to pay him $50,000 in consideration

of a full exoneration from all his liability for these joint-torts. Then suppose he paid the receiver $25,000 in part payment. Which of the various joint *tort-feasors* could claim the benefit of this payment as a *pro tanto* satisfaction?

We say all of them, notwithstanding their liabilities grew out of different transactions, Barnette being a joint *tort-feasor* with all of them.

Respectfully submitted.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
Of Counsel.

No. 2528.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN A. JESSON, et al.,

Appellants,

vs.

F. G. NOYES, Receiver, etc.,

Appellee.

Petition for Rehearing.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Petitioners.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
L. P. SHACKELFORD,
Of Counsel.

The James H. Barry Co.
San Francisco

No. 2528.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN A. JESSON, ET AL.,
Appellants,

vs.

F. G. NOYES, Receiver, etc.,
Appellee.

PETITION FOR REHEARING.

Appellants respectfully petition the Court for a rehearing of this cause and in support of their application urge the following:

I.

The Court in its opinion has through inadvertence misstated certain facts and so has been led to conclusions not justified by the record. These statements all relate to the Barnette trust deeds, and are thus stated in the opinion.

(1) "He [Barnette] stipulated in his deed that the receivers were not to take possession of

the property conveyed, nor the rents, issues or profits thereof, nor had any right to the possession or use thereof at any time prior to November 18th, 1914."

(2) "The receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before November 18th, 1914, and the appellee so pleaded its effect in the reply.

(3) "The property was not surrendered absolutely for the payment of the depositors and holders of unpaid drafts but for the payment of a deficit to be thereafter ascertained as between the amount due depositors and owners of unpaid drafts and the amount realized by the receivers out of the property and assets of the bank.

(4) "None of the proceeds of the property so surrendered by Barnette can be applied to the payment of depositors and holders of unpaid drafts until all the property and assets of the bank shall have been realized and devoted to liquidation.

(5) "There was imposed upon the receivers, when they accepted the surrender, the obligation to pursue all available remedies to recover the assets, including, we think, the assets which may be recovered in the present suit."

II.

The Court in its opinion discusses certain propositions which were not argued or briefed on the appeal and has reached certain conclusions which we submit are erroneous, as follows:

(1) The Court is in error in holding that the complaint states a common law cause of action for

the recovery of the moneys paid for stock surrendered.

(2) The Court is in error in holding that the District Court of Alaska is a court of the United States and so was entitled to take judicial notice of the Nevada Statute.

III.

The Court has misconceived the effect of the Barnette deeds, and so has been led to ignore our defense (Tr., p. 131), that the moneys received by the receiver pursuant thereto should be applied *pro tanto* to the satisfaction of the liability of these appellants.

THE BARNETTE DEEDS.

We most respectfully submit, that this Court has erred in respect to the intent and effect of these so-called trust deeds, executed by Barnette and his wife in favor of the receivers, and this error, we believe, is a result of a misunderstanding by this Court (a) of the facts set forth in said trust deeds; in the petition of Barnettes filed with the Court accompanying the same; the petition of the receivers for instructions; and the order of the Court thereon; and the admissions of the receiver in his pleadings, as well as (b) by the failure of the Court to consider the last, further and separate defense of the appellants (T., 131) to the effect that any money or property received by the receivers in consideration of their covenant not to sue

should be applied in full or partial satisfaction of the liability of these appellants.

This Court, in not allowing the contentions of the appellants—that the acceptance by the receivers of the promises of Barnette and wife, and the conveyance of the property to the receivers to secure the performance thereof; and the right to apply the issues and profits of the Alaska properties in satisfaction of the claims of the depositors and holders of unpaid drafts at such times as the Court might direct, was satisfaction and extinguishment of the liability of Barnette or at least was a covenant not to sue Barnette and thereby operated to extinguish the appellants' liability to the extent of the value of any money or property received by the receivers therefrom, used the following language:

> "There is nothing in the record to show that Barnette stipulated for release from liability from his own acts or for the acts of his associates in the management of the bank. *He stipulated in his deed that the receivers were not to take possession of the property conveyed, nor the rents, issues and profits thereof, nor have any right to the possession or use thereof at any time prior to November 18, 1914.* . . . None of the proceeds of the property so surrendered by Barnette can be applied to the payment of depositors and holders of unpaid drafts until all of the property and assets of the bank shall have been realized and devoted to liquidation."

The Court has inadvertently fallen into an error here in assuming that the trust deeds were identical in

their provisions. There were, it will be remembered, two trust deeds, one conveying property in the Republic of Mexico, and the other conveying property in Alaska. The Alaska property conveyed consisted of real estate in the town of Fairbanks and elsewhere, and mining claims in the vicinity of Fairbanks. *As to these properties it was stipulated* (T., 1043) *that the receiver should take immediate possession and collect the rents, issues and profits.* It was from this source and from the sale of certain of the properties that the sum of $30,905.65 was realized.

The petition filed by Barnette and wife contained the following:

> "And your petitioners . . . further desire that the rents, issues and profits of said real estate and lands situate in the said Fairbanks precinct, shall be collected by the said receivers, . . . and after deducting the reasonable charges for collecting same and taxes and insurance and other expenses, *shall be paid pro rata to the said depositors at such time and in such manner as this honorable Court may hereafter direct*" (T. 944-5).
>
> "And your petitioners . . . desire that if at any time your said petitioners, . . . and each of them, and the said receiver, their successors or successor, shall deem it more advantageous to sell and dispose of, than to hold and retain any of the property situate in said Fairbanks precinct, then the same may be sold and the proceeds derived therefrom shall be delivered over to the said receivers, their successor or successors, to be by them or him paid to the depositors in the way and manner herebefore suggested for the payment of

the rents, issues and profits to the said depositors" (T. 945).

"It being the intent, desire and express wish of said petitioner and each of them and they and each of them do hereby promise and agree to pay the said depositors in full *not later* than the said 18th day of November, 1914" (T. 944).

"That said E. T. Barnette and said Isabelle Barnette, his wife, each desire to grant and convey unto the aforesaid receivers of said Washington-Alaska Bank the said real estate and lands, to be held in trust by the said receivers, their successor or successors, *as security for payment to the said depositors of all sums of money which are now due, owing and payable to said depositors"* (T. 940-1).

"That it is the desire and intention of your petitioners, and each of them, that all said depositors in said Washington-Alaska Bank shall be paid in full their respective deposits, together with interest thereon at the rate of *6* per cent. per annum from the 4th day of January, 1911, until paid, and *not later than* the 18th day of November, 1914" (T. 946-7).

And "your petitioners, and each of them, come into this court and pray:" . . .

"(2) That said order *shall also direct the said receivers, their successor or successors, to collect the rents, issues and profits* derived from the real estate and lands situate in the Fairbanks precinct, Alaska, and disburse and *pay same,* in keeping with the suggestion and request contained in the above petition" (T. 947).

"(3) That said order direct that *if the depositors of the said Washington-Alaska Bank be not paid in full,* including interest upon their said deposits at the rate of six cents per annum, by the 18th day of November, 1914, then the said receivers, their successors or successor, shall sell

and dispose of all said real estate and lands, for the best price obtainable, and the proceeds derived from such sales be applied, first, in payment of said depositors' accounts, together with interest, and the residue, if any, be delivered to the petitioners, E. T. Barnette and Isabelle Barnette, his wife" (T. 947).

The trust deed for the Alaska property contained the following:

"That it has at all times since (the closing of the bank) *appeared,* and is *now apparent,* that there is and will be a large *deficiency* as between the obligations of said banking institution to its depositors and the owners of unpaid drafts on the one side and the proceeds of its property and assets on the other; that by reason of all the premises, the said E. T. Barnette, has heretofore assumed and taken upon himself the obligation to pay the depositors and owners of said banking institution. . . . any deficit that may hereafter be ascertained, as between the amount due each depositor and owner of unpaid drafts . . . with interest . . . and the amount realized out of the property and assets of said bank *and paid to such creditors;* that the amount of such deficit is not known at this time, and cannot be ascertained at any particular period of time in the near future that can now be named, but will be so ascertained by or before November 18th, 1914" (T. 1043).

"It is therefore understood and agreed between the parties hereto that the parties of the second part *may take immediate possession* of all of the property above described and improvements and appurtenances thereunto belonging and thereafter continue to manage, control, lease the same if

necessary, and collect and receive the rents, issues and profits thereof and after deducting reasonable charges for collecting the same, taxes, etc., . . . they shall return to the said court and its receivers the net amount of such rents and profit, *the same to be disbursed by the said court through its receivers pro rata to the said depositors and owners of unpaid drafts heretofore issued by said bank*" (T. 1043).

"And if at any time after the delivery of this deed the said trustees . . . and said parties of the first part shall deem it more advantageous to sell and dispose of than to hold and retain any of the real property above described, then the same may be sold to the purchaser or purchasers by the said trustees, and the proceeds derived from such sale or sales shall by said trustees be delivered to the said court or its receivers and be disbursed under the order of the court pro rata to the said depositors and owners of unpaid drafts; but if it should happen that on the 18th day of November, 1914, the demands of depositors and owners of unpaid drafts of the said bank, with six per cent. per annum interest thereon from January 5, 1911, have not been fully paid and satisfied, either out of the property and assets of said bank as administered by the said receivers, or otherwise, or have not been fully paid and satisfied by the said E. T. Barnette, then the said second parties are authorized to sell the said property and apply the proceeds of said sale in full liquidation of the claims of said creditors" (T. 1044).

The deed for the *Mexican* property provided that the receivers were not to take possession of the same nor have any right to the possession and use thereof

at any time prior to November 18, 1914. This is undoubtedly what led the Court to make the statement in the opinion above referred to. That deed further provided that if upon said date the demands of the depositors and owners of unpaid drafts with interest, have not been fully paid and satisfied, *"either out of the property and assets of the said bank as administrated by the said receiver, or otherwise, or have not been fully paid and satisfied by the said E. T. Barnette,"* then the receivers might take immediate possession of said real estate, and sell the same,

> "and receive the purchase price and turn the same into said court and pay out so much thereof as may be needed to fully liquidate and pay any balance that may remain unpaid of the claims and demands of the depositors and owners of unpaid drafts of said bank, said money to be disbursed under the order of said court" (T. 1033-34).

The Mexican deed then recites that G. Edgar Ward and W. D. Beggs have a contract with Barnette for the purchase of forty-nine per cent. of the Mexican property,

> "in which agreement and contract it is provided that they [Ward and Beggs] will on or before November 18th, 1914, pay to the said E. T. Barnette, the several sums of money mentioned therein, viz: One of Two Hundred Thousand ($200,000) Dollars and interest; another of Twenty-six Thousand and Twenty-five Dollars ($26,025.00) and interest, and other contingent sums mentioned in paragraph four of the said contract . . ."

The deed then provides:

> "Now, therefore, upon all of the considerations hereinbefore mentioned, *if at any time after the delivery hereof and on or prior to November the 18th, 1914,* the said George Edgar Ward and W. D. Beggs, mentioned in the contract, shall express a willingness and desire to pay the said E. T. Barnette any part or all of the sums or sum of money mentioned therein, then the parties of the first part do hereby authorize and empower the parties of the second part and their successors to collect and receive from the said Ward and Beggs such payments, and the said Ward and Beggs are hereby authorized to pay the same to said trustee or trustees herein, such moneys if so paid and received *to be disposed of by second parties in the manner above directed for the distribution of the proceeds of the sale of the land conveyed,* provided always that at the time of such payment there remains something still due to the creditors of said bank" (T. 1034-5).

The receivers in their petition to the Court among other things recite:

> "The rents and issues of the city lots amount to a considerable sum—as much as six hundred and fifty dollars ($650) per month net as we are informed" (T., 951).

The order of the Court directing the receivers to accept the trust deed ordered

> "that you take the necessary steps to secure the same (the Alaskan and Mexican property) and the proceeds and issues therefrom *to the payment*

of the liabilities of the Washington-Alaska Bank, in connection with your duties as receivers in the above-entitled action" (T. 952).

In his reply to the answer of the defendants, the appellee says:

"He admits that the said former receivers entered into the possession of the real property in Fairbanks precinct and proceeded to collect the rentals and royalties therefrom, and that there has been received by said receivers and their successors in office, this plaintiff, from the rentals and royalties on said property a large sum of money, the gross amount is upwards of $30,000.00 as stated, which he is holding subject to the terms and conditions of said trust deed."

"This plaintiff further admits that in the deed of the said Barnette and wife to the property in said Fairbanks District, it is provided that any of said property could be sold at any time on the agreement of said Barnette and wife and said receivers, and he admits that certain property covered by said transfer has been sold by the receiver and said Barnette and wife under and by virtue of the terms of said agreement and that the money realized from said sale has been delivered to said receiver. Plaintiff alleges that said money so received amounts to $2500.00 which he is holding subject to the terms and conditions of said trust deed."

"He admits that the property conveyed by the said Barnette and wife in said Fairbanks precinct consists of improved and income producing properties, the last of which is situate in the business section of Fairbanks, Alaska, and he alleges that the rentals therefrom aggregate approximately $450.00 per month at this time."

> "He admits that the said trust deed has been partially executed to the extent above set forth" (T. 183-4).

We therefore respectfully submit that the Court is in error when it states that Barnette stipulated in his deed that the receivers were not to take possession of the property conveyed nor the rents, issues and profits thereof, nor had any right to the possession or use thereof at any time prior to November 18, 1914, and that none of the proceeds of the property so surrendered by Barnette could be applied to the payment of the depositors and holders of unpaid drafts until the property and assets of the bank shall have been realized upon and devoted to liquidation.

The Court in its opinion says:

> "The receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before the 18th of November, 1914, and the appellee so pleaded its effect in the reply."

Again we say that the Court is in error. There is not a single word of evidence in the record, outside of the petition filed by the receivers Hawkins and Mack, asking instructions from the Court as to what they should do with the trust deeds that in any wise shows what the receivers, who negotiated with Barnette, considered the effect of their acceptance of the trust deeds. F. G. Hawkins and E. H. Mack acted as receivers for the bank from the time that it closed until the 12th day of May, 1911, when they resigned.

The appellee, F. G. Noyes, was then appointed receiver and still continues to act as such.

The receiver Noyes in his reply to the answers of defendants alleges:

> "As to any negotiations between the said Barnette and the then receivers of said bank, or the *purpose thereof,* or as to any proposition made by said Barnette to said receiver or as to any promise and agreement made by the said Barnette to the said receivers, other than as the same are evidenced by deeds of Trust, referred to in said first separate affirmative answer, *this plaintiff has neither knowledge or information sufficient to form a belief* (T. 182).
>
> "This plaintiff alleges that said deed of trust is in writing and expresses for itself the terms and conditions thereof, the uses and purposes for which it was executed and delivered and the admissions, agreements and assumed obligations of said E. T. Barnette and his wife, *and this plaintiff has no knowledge nor information concerning such matters beyond the expressed terms of said deeds"* (T. 187). (Transcript of cross appeal 158).

The allegation contained in the appellee's reply that the acceptance "of said trust deeds operated as an agreement not to sue said Barnette prior to November 18, 1914," is merely the legal conclusion of appellee's attorney. The receivers who accepted the deeds under order of the Court informed the Court "that if these " deeds are accepted, it will be impracticable to pro- " ceed as contemplated to fix the liability against " E. T. Barnette in favor of the creditors of said bank

" by action in the Court here," and did not limit it to any specified term.

We shall further consider this matter hereafter.

OBJECTS AND PURPOSES OF TRUST DEEDS.

The objects and purposes of said trust deeds, as shown by their recitals and by Barnette's petition, were (1) the desire and promise of Barnette and his wife to pay all of the creditors of said bank in full by not later than November 18, 1914; and (2) the desire of Barnette and his wife to "prevent the commencement of legal proceedings and the great and unnecessary expense" that said legal proceedings would entail, " based on the liability of the said E. T. Barnette to " the creditors of said Bank arising out of his manage- " ment of the affairs thereof, from March, 1908, up to " and including January 5, 1911, as its president and " one of the directors thereof."

From the time of the organization of the Fairbanks Banking Company, afterwards known as the Washington-Alaska Bank, until it closed its doors, E. T. Barnette had been its president and manager, a member of the Board of Diretcors, "and as such was active and influential in the control and management of its business affairs." At the time the bank closed Barnette was in the State of Washington. He left shortly thereafter for Fairbanks, Alaska, and there began negotiations with the then receivers for the purpose of preventing suit or action being instituted against him

"based on his liability to the creditors of said bank arising out of his management of the affairs thereof."

As a part of these negotiations, Barnette and wife on the 13th day of March, 1911, filed with the Court a petition accompanied by the two trust deeds, which petition among other things recited:

> "That your petitioners are informed and believe that certain legal proceedings are contemplated and about to be commenced against your petitioners in this Court; which said legal proceedings would subject the real estate and land, situate in the District of Alaska and belonging to your petitioners, to the order and process of the Court and prevent your petitioners from in any way dealing in or with or disposing thereof and all of which real estate and lands are mentioned in this petition; and which legal proceedings would entail great and unnecessary expense upon your petitioner; and that such legal proceedings relate directly to the connection of the said depositors with said Washington-Alaska Bank; and that your petitioners *desire to prevent the commencement of such legal proceedings and the incurring of the said unnecessary and great expense,* by surrendering all the real estate and lands of said petitioners to the said receivers in trust, and your petitioners say that it is their desire and intention of your petitioners, and each of them, that all said depositors in said Washington-Alaska Bank shall be paid in full their respective deposits with interest from January 4th, 1911, until paid, and not later than November 18th, 1914, and for that purpose and to that end they pray that if the depositors are not paid in full by said date that the receivers shall sell the real estate described in said Trust

deed and pay the proceeds thereof in payment of said depositors' accounts."

Each of the deeds also recited in effect that the receivers are about to commence an action (as Barnette and his wife are informed and believe) on behalf of creditors against him to recover from him the amount of any deficit that may be ascertained between the claims of creditors and the amounts realized out of the property and assets of the bank, *"Said action to be based on the liability of Barnette to said creditors arising out of his management of the affairs thereof."*

The deed further recites:

> "That in consideration of said liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank growing out of his connection with the management of the business affairs thereof as its President and one of the directors, and by reason thereof, the said E. T. Barnette and Isabelle Barnette convey to the receivers in trust the property therein described for the uses and purposes therein stated, and the said E. T. Barnette has assumed and does now assume and take upon himself the obligation to pay the depositors and owners of unpaid drafts any deficit that may be hereafter ascertained as between the amount due to each depositor from said banking institution on the 9th day of January, 1911, together with interest, etc., and the amount realized out of the property and assets of said bank and *paid* to such creditors" (T., 1043-44).

It is therefore conclusive that the principal object of Barnette and his wife in executing and delivering said deed and in assuming the obligations therein contained, was their desire to pay all creditors in full by November 18, 1914, and their desire to prevent the commencement of legal proceedings and the incurring of great and "unnecessary expense" against Barnette. Why unnecessary expenses? Because Barnette intended to pay all the creditors in full. And in this connection it may be noted, that Barnette's promise to pay only included the depositors and holders of unpaid drafts. At the time of the execution of the Trust deeds and at the time of the acceptance of the same, the depositors and holders of unpaid drafts were the only creditors whom it was believed the assets of the bank would not pay in full. This is clear from the language of the Trust deeds, each of which recites that the bank was compelled to suspend its general banking business on the 5th of January, 1911, and "at said time was and is now unable to pay in "full its depositors and other creditors the owners "and holders of unpaid drafts" (T., 1028-1039), and further, "that it has at all times since appeared, and "is now apparent that there is and will be a large "deficiency as between the obligations of the said "banking institution to its depositors and owners of "unpaid drafts on the one side and the proceeds of "its property and assets on the other."

Whether this limitation to depositors and holders of

unpaid drafts was made because the other creditors were secured by collateral, as in the case of the Dexter Horton Bank, or whether there were any other creditors does not appear expressly—but by limiting the creditors who could not be paid out of the assets of the bank, to the depositors and holders of unpaid drafts, it is clearly shown by inference that Barnette and the receivers firmly believed that the other creditors, if any, were amply protected.

The lower Court, being of the opinion that the matters proposed by Barnette and his wife in their petition and Trust deeds were matters that should originate with the receivers, on March 14, 1911, directed that the petition and deeds be turned over to them "for their consideration." After six days' consideration, and on the 20th day of March, 1911, the receivers by and with the approval of their attorney, applied to the Court for instructions as to whether they should accept such Trust deeds and undertake the duties and responsibilities entailed thereby, or return the same to the grantors, and in their petition for instructions said receivers expressed the opinion, which their said attorney approved, "that if these deeds are " accepted, it will be impracticable to proceed as con- " templated, to fix a liability against E. T. Barnette, " one of the grantors, in favor of the creditors of said " bank, by action in court here."

Said petition further recites that the issues of the City lots in Fairbanks, amount to a considerable sum,

as much as ($650.00) per month net, and that so far as the receivers knew the property conveyed to them by said deed located in Fairbanks and on the nearby creeks is all the property owned by the said E. T. Barnette in Alaska, that would be subject to seizure on a judgment against him in this court; that the deed contained some valuable real estate that is the separate property of Isabelle Barnette.

It is therefore clear that the receivers understood that the acceptance of the deeds forever precluded them from bringing suit or action against Barnette on account of his liability to the creditors of the bank, or why should they inform the Court that if the deeds are accepted it will be impracticable *"to proceed as "contemplated to fix a liability against E. T. Bar-"nette in favor of the creditors of said bank by action "in court here."*

The word "impracticable" as we pointed out in our opening brief means: "Incapable of being effected "from lack of adequate means: impossible of per-"formance: not feasible: impossible: that which is "impossible cannot be done at all: that which is im-"practicable is theoretically impossible and cannot be "done under existing conditions" (Standard Dictionary).

Why did the receivers deem it impracticable? Simply because the consideration and only consideration—as to Barnette and wife—to support said deeds and the promises therein made to pay the creditors, was

the acceptance by the receivers of the conditions imposed by Barnette and wife that they *"surrender all "the real estate and land of said petitioners to said "receivers in trust" "to prevent the commencement of "such legal proceedings and the incurring of said "unnecessary and great expense"* (T., 946).

The receivers informed the Court that by accepting said deeds that they would not be able to proceed against Barnette, that it would be impossible to do so. That this was the receivers' understanding and that this was the understanding of Barnette and his wife, there can be no question, and when upon the 29th day of March, 1911, after more than a week's consideration, the Court ordered the receivers to "accept the Trust deeds" and take the proper and necessary steps to secure the same [the property therein described] and the *proceeds and issues therefrom to the payment of the liabilities of the Washington-Alaska Bank* in connection with your duties as receivers," the contract was complete and the receivers had surrendered up, for all time, their right to sue Barnette upon the original causes of action.

It is conclusive, therefore, that the principal object of the Trust deeds, and the *only consideration therefore,* was an agreement upon the part of the receiver not to sue Barnette on the original causes of action. The receiver and the Court have both recognized this fact; but have limited the duration of the agreement to a specified time, and this brings us to a con-

sideration of the contention made by the receiver, and as we claim erroneously upheld by this Court, that the acceptance of said Trust deeds operated as an agreement not to sue Barnette prior to November 8th, 1914.

And while the right of the appellants to have anything paid to the receivers in consideration of their agreement not to sue, applied in full or partial satisfaction of their liability, is not in the least affected by the question, as to whether said covenant or agreement not to sue is perpetual or limited as to time—nevertheless it is necessary to point out the error into which this Court has fallen in this respect in order to determine whether said agreement operated as a discharge of the original causes of action or not.

THE ACCEPTANCE OF THE TRUST DEEDS DID NOT OPERATE AS AN AGREEMENT NOT TO SUE BARNETTE PRIOR TO NOVEMBER 18, 1914.

We most respectfully submit, that we are at a loss to understand how the lower Court and this Court reached such a conclusion. We are most emphatic in our statement that there is nothing in the petition filed by the Barnettes, the Trust deeds accompanying the same, the application of the receivers for instructions or the order of the Court thereon, or anything in the record, that in any wise suggests that *the legal proceedings and the great expense incident thereto,* which Barnette and his wife by their deeds, *sought*

to avoid, was only to be *postponed* until November 18, 1914.

The fact is that the very contrary appears. Barnette and wife say: "We desire to prevent the com-"mencement of legal proceedings against Barnette, "and to do so we hereby promise to pay the deposi-"tors, etc., and surrender all of our real estate and "land as security for the performance of said prom-"ise." And the receivers, in consideration thereof, by accepting the deeds agree with Barnette and his wife that they could not and would not sue him to enforce his liability to the creditors of the Bank.

We are at a loss to understand why it was that the 18th day of November, 1914, is picked as the limit of time, before which Barnette cannot be sued. This is the day on or before which Barnette agreed to pay the depositors and holders of unpaid drafts any balance with interest that might be then due them. And this is the day upon which the receivers are authorized—in the event that the claims of the depositors and holders of unpaid drafts have not been fully paid and satisfied, either out of the property or assets of said bank, as administrated by the receivers, or otherwise, or have not been paid by the said E. T. Barnette,—to take possession of the Mexican property and proceed to sell the same, as well as to sell the remaining Alaskan property, and apply the proceeds thereof in payment of the depositors and holders of unpaid drafts. This day was undoubtedly selected by

the receivers and Barnette as the date of payment, because on that day the sum of Two Hundred and Twenty-six Thousand and Twenty-five Dollars, and interest and other contingent sums became due and payable to Barnette from Ward and Beggs on account of their contract with regard to the Mexican property of which we have already spoken, and which, under the terms of the Mexican deed, the receivers had a right to collect, and "pay out to liquidate" any balance "that may remain unpaid of the claims and demands of the depositors and owners of unpaid drafts."

The only times, and the connections in which, "the 18th of November, 1914," is mentioned in any of the papers are as follows:

In the petition of Barnette and wife, to the Court, they state that they desire the receiver to hold the real estate in trust as security for the payment to said depositors of all moneys that shall be found due them after the affairs of the Washington-Alaska Bank shall have been wound up and the assets of said bank realized upon and paid over to said person "such trustee-" ship to continue until the *18th of November, 1914,* " provided the said E. T. Barnette and wife shall have " failed to pay to said depositors any deficit that may " be found to exist after the winding up of affairs of " said bank as aforesaid. It being the intent, desire " and express wish of said petitioners and they and " each of them do hereby promise and agree to pay

"the said depositors in full, not later than the *18th* "*day of November, 1914*" (T., 944).

In the petition (page 947 of Transcript) we find "that payment to the depositors shall be in full not later than *18th November, 1914,*" and again in the petition (T., 947), "That if depositors . . . be not paid in full . . . by *18th day of November, 1914,* then receiver shall sell all said real estate, etc."

In the Trust deeds we find the following mention of this date:

1. "That deficit not known at this time . . . but will be so ascertained by or before *November 18, 1914*" (T., 1033, 1043).

2. "But if it shall happen on *18 November, 1914,* "the demands of depositors and owners of unpaid "drafts . . . have not been fully paid and satis- "fied, etc.," Receiver may sell property and apply proceeds, etc. (T., 1033, 1044).

3. In the Mexican deed November 18, 1914, is given as the date when the moneys due from Ward and Beggs are to be paid.

So, then, this date was used only in connection with the following matters:

1. As the duration of the trusteeship.

2. As the date by which the deficit shall be ascertained.

3. As the date on or before which Barnette and wife promise to pay depositors and holders of unpaid drafts in full.

4. As the date that in the event Barnette and wife do not pay in full or said creditors are not paid out of assets of the bank, that the receiver is authorized to sell any property then unsold described in the Trust deeds.

It is therefore conclusive that the language used in connection with this date cannot be held to limit the duration of the receivers' agreement not to sue Barnette to that period.

What was to happen, if on the 18th day of November, 1914, the said creditors had not been paid out of the assets of said bank or otherwise or by E. T. Barnette?

The receivers were then authorized to sell the property and apply the proceeds upon the said claims. The receivers upon said date could not have brought suit upon Barnette's promise to pay said creditors because under the terms of the deed the real estate would first have to be realized on and applied in liquidation of the claims of said creditors. If there was an overplus, the same was to be returned to Barnette, if not, Barnette then became responsible for any balance due said creditors upon demand, but only upon the express conditions mentioned in the deed, namely:

"That after applying the proceeds of the prop-

> erty and assets of said Washington-Alaska bank, the amount collected by the receiver from George Edgar Ward and W. G. Beggs, if any, the proceeds of the sale of the real property situated in Mexico and the amount or amounts collected, if any, by the receiver from the rents and issues and sale of the Alaska property, *there still remained a balance due said depositors and holders of unpaid drafts,* that then Barnette was liable *to make good such balance or deficiency and pay same to the receivers upon demand"* (T. 1036, 1045).

Before then Barnette became subject to suit on account of his covenants contained in the deed, it required an exhaustion of all of the assets of the bank, the sale of the real property described in the Trust deeds and the application of all moneys received thereunder; in liquidation of the claims of the depositors and holders of unpaid drafts, and a *demand* by the receivers upon Barnette for the balance.

In order to uphold the position that the agreement is a covenant not to sue Barnette for a limited time, this Court must say that when Barnette transferred all of his real estate, situated in Alaska, which was "subject to seizure on a judgment against him," as well as all his property situated elsewhere, and had Mrs. Barnette convey some valuable real estate that was her separate property, in trust to the receivers, as security for their promise to pay said creditors in full by November 18th, 1914, any balance then due them, with the right in the receivers to take possession of the Alaska properties, collect the rents and issues thereof,

as well as to receive and pay any sum that might be paid by Ward and Beggs, and disburse the same pro rata, to the depositors and holders of unpaid drafts, at such time as the Court might direct, that the only thing that Barnette obtained, in consideration thereof, was a postponement of legal proceedings against him on account of his original liability to the creditors of the bank until 1914, or in the language of counsel for appellee (p. 58, Brief) this was "the price paid "by him for his peace until November 18th, 1914. "When that date came and Barnette's promise was un- "fulfilled the bar lifted and he became subject to "suit." Counsel undoubtedly means suit upon the original causes of action. Under this contention Barnette can perform all the promises contained in the Trust deeds, and still be called upon to respond to any other creditor of said bank if any, other than depositors and holders of unpaid drafts; and anything that has been paid by Barnette and wife as a consideration for having the "contemplated legal proceedings" postponed until November 18th, 1914, cannot be applied in full or partial satisfaction of his original liability even though the amount thereof many times exceeds the amount of his original liability.

Such a contention, we submit, is untenable; and if it be the law (which we submit it is not), that large sums of money paid as a consideration for a covenant not to sue for a limited time cannot be applied in full or partial satisfaction of the covenantee's liability—

though if said covenant is unlimited as to time, the consideration paid therefor may be applied in full or partial satisfaction of said liability—then we submit that a law so drastic, which affords the injured party more than one satisfaction, should not be enforced in a Court of Equity, unless the evidence of the intentions to so limit the covenant, is clear, convincing and unequivocal. We submit there is no such evidence in this record.

The agreement, if it did not operate as a release of Barnette, was certainly a covenant not to sue him and was unlimited as to time.

THERE WAS NO DUTY IMPOSED UPON THE RECEIVER TO EXHAUST ALL OF THE ASSETS OF THE BANK INCLUDING THE ASSETS WHICH MAY BE RECOVERED IN THE PRESENT CASE.

The law in dealing with joint tort-feasors plays no favorites. The injured party may sue one or all. All that the law looks to, is that the injury be satisfied. If said injury be satisfied, either by release of one joint tort-feasor or be partially or fully satisfied by one joint tort-feasor, as a consideration of a covenant not to sue him for a permanent or limited time, then anything received by the injured party must be applied in partial or full satisfaction of the liability of his joint tort-feasors.

Now in the case at bar, the receiver obtained from Barnette, a joint tort-feasor with the appellants, property of great value as security for the faithful per-

formance of Barnette's promise to pay the owners and holders of unpaid drafts any deficit that might remain upon the 18th day of November, 1914, between the amount due said creditors and the amount realized out of the assets of said bank and *paid to said creditors.* If upon said 18th day of November, 1914, the demands of said creditors were not paid either (1) out of the assets and property of said bank administered by said receivers or otherwise: or (2) have not been fully paid and satisfied by E. T. Barnette, then the receiver was authorized to sell the property and apply the proceeds thereof in liquidation of said claims.

At the time of the execution of said deeds, it was apparent as recited in the deeds that there was a large deficiency between the amount due said creditors on the one hand and the proceeds of the Bank's assets on the other and Barnette assumed to pay the same with interest. And at said time authorized the receiver to collect the rents and issues from the Alaska property and pay the same to the depositors and holders of unpaid drafts at such time as the Court might direct. It, thereby, became the duty of the receivers to apply the amount so collected in reduction of the claims of these creditors, because it was their duty to stop the running of interest as soon as possible. The receivers' right to the rents and issues of the Alaska properties became absolute the minute they were received by them, because there was a large deficiency between

the amount due said creditors and the amount to be realized out of the assets of the bank. (T. 215.)

Of course this Court does not know from the Record in this case as to whether Barnette has fulfilled his promise to pay said creditors or not. In the event he has not, then the receiver on the 18th of November, 1914, was authorized to sell both the Alaska and Mexican properties. Upon the trial it was proven uncontradicted that the value of the Alaskan property outside of the moneys collected, was the sum of Forty-Five Thousand Dollars ($45,000.00).

Under the terms of the deed the proceeds of the sale of the real property became absolutely the property of the receiver, if Barnette failed to meet his promises. So then, the receiver has obtained from Barnette in consideration of his covenant not to sue Barnette, up to April, 1914, the sum of Thirty Thousand, Nine Hundred and Five Dollars and Sixty-five cents ($30,905.65) and real-estate of the value of ($45,000.00) at the time of trial, situate in Alaska, to say nothing of the property situated in Mexico.

We submit that even if said Trust deeds did not operate to release Barnette from his original liability, but only as a covenant not to sue him, that nevertheless it was on account of the wrongs done the bank that the receiver obtained this money and property and to that extent the claim of the appellee against these appellants must be reduced.

It is true that in the recitals of both trust deeds, it

is set forth, that E. T. Barnette has assumed the obligation to pay the depositors and owners of unpaid drafts, any deficit that may hereafter be ascertained as between the amounts due depositors and owners of unpaid drafts, with interest, and the amount realized out of the property and assets of said bank and paid to such creditors. That the amount of such deficit cannot be ascertained at any particular period of time, but will be so ascertained prior or before November 18th, 1914.

There is nothing in this recital that is inconsistent with Barnette's covenant to pay said creditors in full upon said date. If upon said date, Barnette had not paid the same, or the same was not paid out of the assets of the bank, Barnette's property was subject to the payment of the same.

Under this recital, not only must the assets of the bank have been realized on, but the amount thereof must be paid to such creditors, and this very thing seems to have been in the minds of the parties when Barnette in the trust deed authorized the receivers to sell the property and apply the proceeds thereof in payment of any amount that had not been fully paid and satisfied, either out of the property and assets of said bank, as administered by the receivers or otherwise or paid by E. T. Barnette.

The recital that the amount of said deficit will be ascertained on or by November 18th, 1914, cannot affect Barnette's obligation to pay on said date. To

illustrate: all of the assets of said bank, after the receiver had realized on the most valuable ones, could have been sold under order of the Court to thoroughly responsible parties on time payments; the amount realized from all of the assets would at that time be definitely known as also the amount of the deficit between the claims of said creditors and the amounts realized from the assets of said bank and paid to such creditors.

So then, we submit that there is nothing that required the receiver to exhaust all of the assets of said bank before Barnette's liability and obligation to pay became fixed and likewise there was no duty imposed upon the receivers to pursue the asset which may be recovered in this case.

ACCORD AND SATISFACTION.

We submit that the Court is in error in holding that the acceptance of the Trust deeds did not operate as a release of Barnette, on account of his admitted liability to the creditors of the bank. It is true that there are no words of expressed release set forth in the petitions or Trust deeds. This is not necessary. A release may be implied from all the facts and circumstances surrounding the transaction. It is a matter of intent. We say that such an intent can be gathered from the record in this case and that the agreements constitute something more than a mere covenant not to sue. We say that the promise of Bar-

nette to pay by November 18, 1914, any deficit that might then be due the depositors and owners of unpaid drafts and the transfer by Barnette and his wife of all of their property to secure the performance of said promise, was the substitution of an agreement for the liability of a tort and was accepted in satisfaction of the tort. The very fact that the Trust deeds provided the manner in which Barnette was to become liable for any balance that might be due said creditors after all of the assets of the bank and the assets derived from the sale and income of the Barnette properties had been applied in liquidation thereof, conclusively to our mind shows that Barnette was released on the original causes of action. It is true as stated by the Court that an accord and satisfaction requires an agreement, an *aggregatio mentium*, and it must finally and definitely close the matter covered by it. Nothing of or pertaining to that matter must be left unsettled or open to further question or arrangement. We submit that there was nothing of or pertaining to Barnette's liability to the creditors of the bank that was left unsettled or open to further question or arrangement. That liability was completely discharged and he assumed a new responsibility, namely: to pay the depositors and holders of unpaid drafts any deficit due them by November 18th, 1914. It is true that it was apparent that the amount of this deficiency was very large, that the amount thereof could not then be definitely ascertained, but this in no wise affected Bar-

nette's promise to pay or left the manner of his original liability open to further question or arrangement.

The test of this matter is, could the receiver bring suit after the execution of these Trust deeds against Barnette, based upon his original liability to the creditors of the bank. If he could, there was of course no discharge or release, if he could not, there was.

An absolute covenant not to sue one or less than all of several joint tort-feasors never operates as a release, and not even the covenantee can plead it as a defense, for such a covenant does not extinguish the cause of action, but he must seek his remedy in an action on the covenant. *A fortiori,* a limited covenant would so operate. However, whatever consideration is received for the agreement or covenant not to sue must be applied to the payment *pro tanto* of the recovery against the other wrong doers. (34 *Cyc.,* 1090).

See *Miller* v. *Fenton,* 11 Paige, 20, discussed in our opening brief, page 189, and the following authorities:

Parry Mfg. Co. v. *Crull,* 101 N. E., 759;
Cleveland v. *R. Co.,* 86 N. E., 485;
Chicago R. R. v. *Averill,* 127 Ill. App., 275; 224 Ill., 516;
City of Chicago v. *Babcock,* 143 Ill., 358;
Fitzgerald v. *Union Stock Co.,* 33 L. R. A. (N. S.), 983;
Snow v. *Chandler,* 10 N. H., 92;
Knapp v. *Roche,* 94 N. Y., 329;

Bloss v. *Plymale,* 3 W. Va., 393;
Chamberlin v. *Murphy,* 41 Vt., 110, 119;
Irvine v. *Mulbank,* 15 Abb. Pr. (N. S.), 378;
Louisville v. *Barnes,* 117 Ky., 860;
Carey v. *Bibby,* 129 Fed., 203;
El Paso v. *Darr,* 93 S. W., 167;
Edens v. *Fletcher,* 79 Kan., 139, 147;
Robinson v. *Trammell,* 83 S. W., 258, 265;
Chicago v. *Smith,* 95 Ill. App., 340;
Arnett v. *Missouri Pac.,* 64 Mo. App., 368, 375;
Bailey v. *Delta,* 86 Miss., 634;
Dury v. *Connecticut,* 86 Conn., 74;
Abb. v. *R. R. Co.,* 58 L. R. A., 290;
Judd v. *Walker,* 158 Mo. App., 167;
McDonald v. *Grocery,* 184 Mo. App., 432;
Ellis v. *Esson,* 50 Wis., 138;
Smith v. *Gayle,* 58 Ala., 600;
Meixell v. *Kirkpatrick,* 29 Kan., 679, 684;
Merchants Nat'l Bank v. *Curtis,* 37 Barb., 317;
Bowman v. *Davis,* 13 Colo., 297, 22 Pac., 507;
Heyer Bros. v. *Carr,* 6 R. I., 45;
Home Telephone Co. v. *Fields,* 150 Ala., 306, 312.

Judd v. *Walker,* 158 Mo. App., 156; 138 S. W., 635, was a suit for damages for the fraud and deceit of Fred Naxera and Allen M. Walker. While the

suit was pending the plaintiff executed a writing in words and figures as follows:

> "In consideration of the payment of the sum of $350.00 by Fred Naxera to Ball and Sparrow, attorneys for plaintiff it is agreed that the case so far as Fred Naxera is concerned, shall be dismissed and that the further prosecution of the same be only against Allen M. Walker.
>
> Feb. 20, 1909, Ball & Sparrow,
>
> Attorneys for Plaintiff."

The Court after citing *Lovejoy* v. *Murrey,* 3 Wall., 1, to the effect that there can be but one satisfaction for a wrong; that such is the only just and equitable rule of decision, say:

> "In accord with these principles, it is obvious the principles of natural justice alone require that the plaintiff's recovery, if any, against Walker should be diminished to the extent he has been mitigated by Naxera, for, though there be no release such payment by one tort feasor are available *pro tanto* to the use of the other as a matter of mitigation in the final award of damages accrued because of the tort of both."

In the case of *Goetjens* v. *City of New York,* 145 App. Div. (N. Y.), 640, 130 N. Y. S., 405, plaintiffs sued three defendants for negligence. Pending trial the plaintiff made a settlement with two of the defendants for $2000.00 and thereupon an order was made discontinuing the action as to them and left a sole defendant. The jury were instructed that any

question of damages involved the deduction of the $2000.00 paid by the dismissed defendants.

The Appellate Court in affirming the judgment said:

> "The complaint is upon an alleged joint tort. The plaintiff has received satisfaction to the extent of $2,000.00. The effect of the stipulation and the order was a covenant not to sue the other tort feasor. *Gilbert* v. *Finch,* (73 N. Y., 455, 466.) But plaintiff was entitled *to pursue this defendant for only so much of the compensation for the injury as has not been paid. Otherwise he could receive some compensation for his injuries from two of the joint tort feasors and yet full compensation therefor from the other tort feasors.*"

In the case of *St. Louis etc.* v. *Bass,* 140 S. W., 860, plaintiff released two railroad companies from liability from personal injury due to joint negligence. The Court limited the recovery from the third company to the damages sustained in excess of the amount paid under settlement.

> "And if the consideration which the plaintiff has received from one joint tort feasor is the full amount of the damages he has suffered, no further recovery can be had against the other tort feasor."

Button v. *Louisville,* 118 S. W., 977.

In the case of *Atchison etc.,* v. *Classin,* 134 S. W., 358, the sum of $215.00 was paid by one railroad company on the understanding that it should not debar suit against the other. The defendant claimed

that the effect of this payment operated as a release as to it. But the Court said:

> "We concluded that the release did not operate to bar plaintiff's right to sue the defendant. There was nothing disclosed showing liability on the part of any of the companies named in the release for this occurrence and they were not joint tort feasors with defendant. The release negatives any admission of liability by reason of the payment of the $215.00, and in connection with this the testimony of plaintiff on the subject which was not contradicted, showed that it was a gratuity and not intended as compensation for plaintiff's claim. However, it was on account of his injury, that he received the payment—and to that extent we think plaintiff's recovery should be reduced."

Accord and *part performance* do not constitute a satisfaction. If performed in part only, the original right of action remains and the party to be charged is allowed what he has paid in diminution of the amount claimed.

> 1 C. J., 533, sec. 21, citing
> *King* v. *Atlantic etc.,* 157, N. C., 44-54.
> *Brunswick* v. *R. Co.,* 80 Ga., 534-9.

As was said in *King* v. *R. R.,* 157 N. C., 54,

> "As long as the accord as executory, although it is partially performed, the original cause of action is not extinguished, and an action may be brought upon it, and the remedy of the defendant is to *plead* his part performance as a satisfaction *pro tanto.* He gets credit for all he has paid upon it."

It is not essential in an accord and satisfaction or compromise more than in other contracts that the agreement be expressed. It may be implied from circumstances indicating the intention of the parties.

Hunt on Accord & Satisfaction, p. 25,
7 C. J., 509.

In 24 *Am. & Eng. Ency. Law* (2 ed., p. 307) the law is stated as follows:

> "But it is the well settled rule that, where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releaser has received was received in full satisfaction of his wrongs; and if it appears that it was not so received it is only *pro tanto* a bar to an action against the other wrongdoers."

FAILURE TO PLEAD THE STATUTE.

Appellants asked for a reversal of the judgment in this case, among other reasons, because the statute of Nevada relating to reduction of the capital stock and payment of dividends was not pleaded and was not found as a fact.

In discussing this point in the opinion the Court makes two answers to this proposition:

1st: That the complaint stated a cause of action at common law, and

2nd: That the court below was entitled to judicially notice the Nevada Statute.

NO COMMON LAW CAUSE OF ACTION STATED.

We respectfully submit that the Bill does not state a cause of action at common law, for the reason that at common law it would have been necessary, in order to charge these defendants with liability, to bring home to them knowledge of the insolvency of the Bank at the time the stock purchases were made, or, in the alternative, their failure to exercise such care in the administration of their offices as would have necessarily resulted in their acquiring such knowledge.

In the opinion the Court says:

> "The complaint did not lack the necessary averments to constitute a cause of action. It alleged that the dividend was wrongfully and unlawfully and fraudulently declared and paid, and sets forth facts to sustain the allegation, and also alleges facts to show that the monies paid out for the surrender of stock certificates were fraudulently and illegally paid out of the capital of the corporation. Those allegations were sufficient to constitute a cause of action at common law:"

We respectfully submit that the allegations of the complaint are not sufficient to sustain a cause of action at the common law.

Of course, the words "wrongfully and unlawfully" add nothing to the pleading. The only allegations

of the complaint on the subject of the unlawful reduction of the capital stock, are as follows:

Paragraph XIX:

> "Shortly after said corporation, the Fairbanks Banking Company, commenced business, said corporation wrongfully and unlawfully began to reduce its issued capital stock by accepting the surrender thereof and giving in return therefor either cash or the stock subscription notes given for said stock, a list of which stock so surrendered together with the date of surrender, the number of shares surrendered, the name of the party surrendering and the amount of cash or the subscription notes returned therefor, is as follows."

Then follows a list aggregating the sum of $56,000. The complaint then goes on:

> "That during all the time from and including said June 30, 1908, to and including said October 25, 1910, the liabilities of said corporation to its general creditors greatly exceeded its assets, and by accepting the surrender of its capital stock and returning therefor cash or subscription notes as aforesaid, the assets of said corporation to which said creditors could look for payment of their claims were further decreased, and the same were, in the manner and amounts aforesaid, withdrawn and divided among said stockholders of said corporation; *that the surrender of said stock and the return of said cash and notes* as above set forth, were made to and by said corporation with full knowledge, consent and approval of the defendants and each of them who constituted its Board of Directors and officers on the dates aforesaid, or by the exercise of ordinary care the same could

have been known to them and each of them; that the terms of office of the defendants herein as officers and directors of said Fairbanks Banking Company, a corporation, were as follows:"

Then follows a list of the officers and directors with their terms of office.

We beg to call the Court's attention to this allegation. It will be noted that nowhere is it alleged that *the directors knew that the liabilities of the corporation to its general creditors exceeded its assets,* or that by the exercise of ordinary care could they have known that fact, nor does it appear from this allegation that the directors did know, or by the exercise of ordinary care could have known that the payment for said stock so surrendered was not made out of surplus or net profits (Tr., p. 21).

There is no finding that the liabilities of the corporation to its general creditors exceeded its assets. The only finding bearing upon the subject is No. LI (p. 209), "that when stock was so taken back by the "corporation the amounts paid therefor were either "paid in cash or the notes held by the bank were "cancelled and surrendered to the stockholders; that "said bank had no surplus or undivided profits "against which the same could be charged."

There is absolutely no finding of any knowledge on the part of the defendants, or that they could have obtained the knowledge by ordinary care, that the bank had not a surplus against which these stock sur-

renders could be charged. The substance of the finding is that the directors acquiesced in the stock surrenders and in some cases approved of them (Finding LIV, p. 211); but nowhere does it appear from the findings that the directors had or by the exercise of ordinary care could have had any knowledge of any facts showing or tending to show that there was no surplus or undivided profits against which the stock surrenders could be charged.

For these reasons we respectfully urge that the Court is in error in its statement that the facts set forth in the complaint sustain the allegation that the moneys paid out for the surrender of the stock certificates were fraudulently and illegally paid out of the capital of the corporation.

In order for there to be a cause of action stated at the common law charging these directors with responsibility for the payment of the moneys in the purchase of the surrendered stock, it was essential that the complaint should directly allege either that the directors knew that the corporation had no surplus or undivided profits, or that in the exercise of ordinary care they would have so known. Even taking the finding and the complaint together, there is not enough by patching allegation with finding to state a cause of action at the common law, were such a course permissible; but, of course, the defect of allegation in the complaint is not cured by finding, nor is the find-

ing of any materiality where it is not responsive to some allegation of the pleading.

The opinion also says:

> "It alleged that the dividend was wrongfully and unlawfully and fraudulently declared and paid and sets forth facts to sustain the allegation."

Again, we submit, the Court is in error. It is alleged that

> "on the 12th day of April, 1910, said Fairbanks Banking Company acting by its then Board of Directors, by a resolution entered on the minutes of the said Fairbanks Banking Company, a corporation, wrongfully and fraudulently declared and ordered to be paid on its then outstanding capital stock of $168,600, a dividend of 20%, amounting to $33,720, which said dividend was thereupon actually paid to the then stockholders of the Fairbanks Banking Company, a corporation (Par. 26, page 30)."
>
> "On said 12th day of April, 1910, at and before the time when the same was ordered to be paid, the said Fairbanks Banking Company, a corporation, was and long prior thereto had been in a grossly insolvent and failing condition . . . said Fairbanks Banking Company, a corporation, had in fact, on said date, no earnings, surplus or undivided profits on hand out of which said dividend could legally be paid, but on the contrary had at and prior to said date, neither capital nor surplus. . . . (Par. 27, page 31)."

There is no finding covering this allegation. The finding is (61, p. 214) that at the time the said dividend was so declared and paid, the said Fairbanks

Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid.

There is no finding whatever that the dividend was paid by the Bank with the knowledge, consent and approval of the defendant out of, by and with the funds and moneys of the depositors of the Bank, and not by, out of, or with the surplus earnings, or undivided profits of the Bank.

JUDICIAL KNOWLEDGE OF THE NEVADA LAW.

The Court says again:

> "It is our opinion that the Court below was authorized to take judicial cognizance of the law of Nevada,"

and cites,

Mills v. *Green,* 159 U. S., 651, 657,

as follows:

> "The lower courts of the United States, and this court on appeal from their decisions, take judicial notice of the constitution and public laws of each state of the Union."

The Court goes on to say:

> "The District Court of the Territory of Alaska is, we think, one of the 'lower courts of the United States' to which the rule applies, and while we find no adjudication to that precise effect it is significant that in *Cheever* v. *Wilson,* 9 Wall, 108,

the Court held that the rule is applicable to the Courts of the District of Columbia."

We respectfully urge that the Court has fallen into a serious error here and that if the opinion is allowed to stand, it is likely to constitute a future source of confusion and uncertainty as to the status of the District Court of Alaska.

THE ALASKA COURT IS NOT A UNITED STATES COURT.

If the District Court of the Territory of Alaska is a lower court of the United States within the meaning of the rule that courts of the United States take judicial notice of the laws of the various States, then it is a lower court of the United States for other purposes.

For example—as to the manner of empaneling grand jurors, *Reynolds* v. *U. S.,* 98 U. S., 145; the mode of charging petit juries, *Miles* v. *U. S.,* 103 U. S., 304; the right of defendants to separate trials and the regulation of peremptory challenges to juries, *Cochran* v. *U. S.,* 77 C. C. A., 432, 147 Fed., 206.

The Court refers to the decision in *Cheever* v. *Wilson,* 9 Wall., 108, that the Supreme Court of the District of Columbia is a lower court of the United States.

The rule that the courts of the District of Colum-

bia are lower courts of the United States has long been settled.

Embry v. *Palmer,* 107 U. S., 3;
Moore v. *Pywell,* 9 L. R. A., 1078.

The decisions of the Supreme Court of the United States draw the distinction between (1) the Federal courts established under Article 3 of the Constitution, and (2) the courts established under Section 8 of Article 1 of the Constitution conferring upon Congress the power of exclusive legislation over such district as might become the seat of government, and (3) the courts established by Congress for territories under Article 4 conferring power upon it to make all needful rules and regulations respecting the territory belonging to the United States.

The courts established under Article 3 of the Constitution are treated as courts of the United States proper. Those courts created under Section 8 of Article 1 of the Constitution are designated as legislative courts, but nevertheless courts of the United States.

As was said in *Embry* v. *Palmer,* 167 U. S., 3-9,

> "That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District, which the Constitution has given to Congress."

The third class, those created under Article 4, are also designated as legislative or territorial courts, and

although having the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District courts of the United States, this does not—in the language of the U. S. Supreme Court in *Reynolds* v. *U. S.*, 98 U. S., 145-154:

> "make them circuit or district courts of the United States. We have so often decided. *American Insurance Co.* v. *Canter,* 1 Pet., 511; *Benner* v. *Porter,* 9 How., 235; *Clinton* v. *Englebrecht,* 13 Wall., 434. They are courts of the *territories invested for some purpose with the powers of the courts of the United States.*"

The Court of Appeal of the District of Columbia in *Moss* v. *United States,* 23 App. Cases, D. C., 475-481, has clearly pointed out this distinction. The Court said:

> "Now it is contended on the part of the United States that the Supreme Court of the District of Columbia is not a court of the United States, within the meaning of Sec. 725 of the Revised Statutes of the United States, U. S. Comp. Stat., 1901, p. 582, and that therefore the said section does not apply in this case.
>
> "And this presents a question that has often been presented and discussed, and, as we think, definitely decided by the highest authority.
>
> "But why is the Supreme Court of this District not a court of the United States within the meaning of the term 'Courts of the United States,' as employed in the act of 1831, and Section 729 of the revised Statutes? It is said that the judicial power imparted to it is not a part of the judicial

power delegated to the United States by Article 3, Section 1 of the Constitution. But that was but a general delegation of judicial power, and should be construed in connection with all the delegated power confided to the United States government by the Constitution. That provision of the Constitution which declares (Art. 1, Sec. 8) that Congress shall exercise exclusive legislation in all cases whatsoever, over such district (not exceeding, etc.) by cession of particular states, and the acceptance of Congress as shall become the seat of the government of the United States, vest in Congress plenary power over the district for all purposes. Such grant of power necessarily implies the power of Congress to ordain and establish such courts as should be found necessary for the orderly and proper government of the district and the people residing therein; the cession to be made and accepted by Congress for the United States as a *permanent* seat of government organized under the Constitution. And though the courts of the district are created and established by act of Congress the power for such creation and establishment is no less derived from the Constitution than the power under Article 3, Section 1 of the Constitution to ordain and establish inferior courts to the Supreme Court of the United States. All courts thus established by Congress, while the creations of Congress, are authorized by the Constitution and are therefore courts of the United States for the administration of the laws of the United States. The courts of general jurisdiction of the District of Columbia are certainly not mere municipal courts; and *they have always been distinguished from mere territorial courts,* created for a temporary purpose and the judges of which may be appointed for a limited term subject to removal by the President. Indeed the courts of general jurisdiction of this district have been treated and regarded from the

time of their first creation and establishment down to the present times as courts of the United States and it is difficult to perceive how they could be otherwise designated. They have been so declared by the Supreme Court of the United States upon more than one occasion. *Embry* v. *Palmer,* 167 U. S., 3-20; *Phillips* v. *Negley,* 117 U. S., 665-674-5. . . .

"In addition to the foregoing consideration and authority for maintaining that the Supreme Court of this district is a court of the United States, Congress in adopting the code of laws for this district by Sec. 31 thereof, has declared that the Supreme Court of this district 'shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States and *shall be deemed a court of the United States,*' and by Sec. 1 of the code it is declared that all general Acts of Congress not locally inapplicable in the District of Columbia—shall remain in force in said district. These, however, are nothing more than general legislative declarations in affirmance of pre-existing decisions upon the subject."

See also

Moore v. *Pywell,* 29 App. Cas., 312, 9 L. R. A. (N. S.), 1078.

A long established line of decisions holds that territorial courts are not courts of the United States:

McAllister v. *U. S.,* 141 U. S., 174;
Parsons v. *U. S.,* 167 U. S., 324;
Hornbuckle v. *Toombs,* 18 Wall., 648;
Reynolds v. *U. S.,* 98 U. S., 145;
Benner v. *Porter,* 9 How., 235;

American Insurance Co. v. *Cauter,* 1 Pet., 511;
Page v. *Burnstine,* 102 U. S., 664;
Good v. *Martin,* 95 U. S., 90;
U. S. v. *Coe,* 155 U. S., 76;
Clinton v. *Englebrecht,* 13 Wall., 434;
U. S. v. *McMillan,* 165 U. S., 504;
Steamer Coquitlam v. *U. S.,* 163 U. S., 346.

They are courts of the Territories invested for some purposes with the powers of courts of the United States.

Reynolds v. *U. S.,* 98 U. S., 145.

In *Summers* v. *U. S.,* 202 Fed., 457, 461, this Court, speaking through Gilbert, C. J., and referring to this line of decisions, said:

> "It is true that these decisions hold that the territorial courts are not courts of the United States, but are legislative courts of the territories, and that the manner of summoning and impaneling jurors, the *practice, pleadings,* forms and modes of procedure, qualifications of witnesses and forms of indictment prescribed by statute for the Circuit and District Courts of the United States *have no application to them,* but that they are required to follow the territorial law in all those respects, unless it be otherwise provided by a statute of the United States."

In the Summers case the question was whether an indictment in the Alaska court must charge one crime only and in one form only as provided by the Alaska

Code, or whether the provisions of U. S. Rev. Stat., Section 1024, allowing two or more counts in one indictment would apply, and notwithstanding the language above quoted from the opinion this Court held that Section 1024, Rev. Stats., did apply.

The Summers case, however, was reversed on appeal to the Supreme Court, *Summers* v. *U. S.*, 231 U. S., 92, the Court saying:

> "It is established that the courts of the territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts, but this does not make them circuit and district courts of the United States. It has been hence decided that the manner of impaneling grand juries prescribed for the circuit and district courts does not apply to the territorial courts. *Reynolds* v. *United States,* 98 U. S., 145, 154, 25 L. Ed., 244, 246. See, as to trial juries, *Clinton* v. *Englebrecht,* 13 Wall., 434, 20 L. Ed., 659. In the latter case it was said 'that the whole subject-matter of jurors in the territories is committed to territorial regulation' (p. 445).
>
> "This principle was applied to the mode of challenging petit jurors *(Miles* v. *United States,* 103 U. S., 304, 26 L. Ed., 481) ; to give defendants the right to separate trials and for the regulation of peremptory challenges to jurors *(Cochran* v. *United States,* Circuit Court of Appeals, eighth circuit, 77 C. C. A., 432, 147 Fed., 206, 207). In *Fitzpatrick* v. *United States,* 178 U. S., 304, 307, 308, 44 L. Ed., 1078, 1080, 1081, 20 Sup. Ct. Rep., 944, it was said that the laws of Oregon must be looked to for the requisites of an indictment for murder, rather than the rules of the common

> law. And this by virtue of the act providing a civil government for Alaska. . . See also *Thiede* v. *Utah,* 159 U. S., 510, 40 L. Ed., 237, 16 Sup. Ct. Rep., 62."

Summers v. *United States,* 231 U. S., 141.

And it was expressly held in *McAllister* v. *U. S.,* 141 U. S., 174, that the District Court of Alaska is not a court of the United States.

And again in

Jackson v. *U. S.,* 102 Fed., 473,

this Court, speaking through Hawley, J., said:

> "The District Court of the District of Alaska is not strictly speaking a court of the United States and does not come within the purview of acts of Congress which speak of 'Courts of the United States' only."

Citing

Clinton v. *Englebrecht,* 13 Wall., 434;
Reynolds v. *U. S.,* 98 U. S., 145, 154;
McAllister v. *U. S.,* 141 U. S., 174;
Thiede v. *Utah,* 159 U. S., 510, 514, 515;
U. S. v. *McMillan,* 165 U. S., 504, 510.

By the Act of 1884, the laws of Oregon were extended to Alaska. At that time the Oregon Code of

Civil Procedure provided (Sec. 720) of what facts judicial notice should be taken.

> "3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States."

It was held by the Oregon court that they would not take judicial notice of the laws of another State.

> *Scott* v. *Ford,* 97 Pac., 99;
> *Cressy* v. *Taton,* 9 Ore., 541;
> *Goodwin* v. *Morris,* 9 Ore., 322;
> *Balfour* v. *Davis,* 14 Ore., 47, 12 Pac., 89.

And that law having been extended to Alaska is the rule of decision of the courts of that Territory.

DEPARTURE FROM LAW TO LAW.

But assuming for the sake of argument that the Alaska Court was entitled to take judicial notice of the Nevada law, we still contend that the failure to plead the Nevada law is fatal to the right to recover, and in support of our position we refer the Court to the case of *Union Pacific Railway Co.* v. *Wyler,* 9 Wall., 108. In that case plaintiff brought an action in the Missouri court against the defendant corporation, for a personal injury, alleging that defendant employed as a fellow servant of plaintiff, one K., who was, and was known to defendant to be, incompetent and unfit for his position, and that through the negligence of defendant in employing said K. the injury

happened. The cause was removed to the Federal Court, and after proceedings there plaintiff amended his petition by adding an averment that the injury resulted from the negligence of defendant, its agents and servants, and in consequence of the negligence of said K. Subsequently plaintiff again amended his petition by omitting the allegations as to the incompetency of K. and defendant's knowledge thereof, and rested the cause of action solely on the negligence of K. under a statute of Kansas, in which State the injury occurred, giving a right of action for the negligence of a fellow servant, which statute was pleaded.

It was held that the second amended petition by changing the ground of the action from the general law to a special statute, constituted a departure, and set up a new and different cause of action from that stated in the former petitions. The Court said:

> "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure

from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is *a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right.* It is true that the federal courts take judicial notice of the laws of the several states. *Priestman* v. *U. S.*, 4 Dall., 28; *Owings* v. *Hull,* 9 Pet., 607; *Drawbridge Co.* v. *Shepherd,* 20 How., 227; *Cheever* v. *Wilson,* 9 Wall., 108; *Junction R. Co.* v. *Bank of Ashland,* 12 Wall., 226. This rule, however, does not affect the present suit, which was commenced in the court of Missouri. *Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes, which is a matter of evidence.* The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of parliament, yet there a departure is made, and a new cause of action is asserted, when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute."

The question that presents itself here is: "Can "plaintiff recover from the defendants for a statutory "liability when the cause of action set forth in the "amended complaint alleges a common law liability, "the essentials necessary to create such common law "liability not having been found by the Court?"

In other words, this Court has found as a matter

of law that the corporation had a right to purchase and receive back its own stock, provided that payment for the same was made out of its surplus and not out of its capital. And the Court has found that as the directors permitted stock to be surrendered back to the corporation and that the payment of the same was not made out of any "surplus or net profits," that the same was in violation of the laws of Nevada and that the directors permitting the same were liable, irrespective of the question as to whether or not the directors knew, or by the exercise of reasonable care should have known, that there was no surplus or net profits out of which the same could be paid.

This Court has found that the complaint did not lack necessary averments to constitute a cause of action at common law. It is thus evident that plaintiff was seeking to charge defendants with a common law liability, *and not* on account of any statutory liability, yet the lower Court found the defendants' acts were illegal and wrongful, and in violation of the laws of the State of Nevada, not in violation of the common law where the measure of a director's liability is based on principle different from the statutory law, but under the laws of the State of Nevada. We contend this cannot be done.

The Court will not resort to its judicial knowledge of state legislation in order to help out the pleadings. 7 *Encyc.,* U. S. Rep., 696.

Appellants have gone into these matters more fully perhaps than is usual on applications of this character. It has seemed necessary, however, in order to make appellants' position clear. If they have transgressed in this regard they ask the Court's indulgence.

Respectfully submitted.

McGOWAN & CLARK,
A. R. HEILIG,
JOHN L. McGINN,
Attorneys for Petitioners.

METSON, DREW & MACKENZIE,
CURTIS HILLYER,
CHARLES J. HEGGERTY,
L. P. SHACKELFORD,
Of Counsel.

No. 2537

See briefs in 2535

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2537

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Attorneys.

For Appellants:

JOS. K. HUTCHINSON, Esq., 923 First National Bank Building, San Francisco, California; and

CHAS. W. SLACK, Esq., 923 First National Bank Building, San Francisco, California.

For Appellee:

H. L. CLAYBERG, Esq., 937 Pacific Building, San Francisco, California.

Messrs. CLAYBERG & WHITMORE, 937 Pacific Building, San Francisco, California; and

R. P. HENSHALL, Esq., Los Angeles, California. **[3*]**

[Citation on Appeal (Original).]

United States of America,—ss:

The President of the United States, to E. Thompson, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, are appellants, and you are appellee, to show cause, if any there be, why the decree ren-

*Page number appearing at foot of page of original certified Record.

dered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California, this 25th day of December, A. D. 1914.

BENJAMIN F. BLEDSOE,
United States District Judge. [4]

Due service of within Citation on Appeal, and receipt of copy thereof, is hereby admitted this 26th day of December, 1914.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Solicitors for Complainant and Appellee E. Thompson.

[Endorsed]: No. B. 55—Eq. United States District Court, for the Southern District of California. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Citation on Appeal. Filed Dec. 28, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Eq. R. B.

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants. **[5]**

In the District Court of the United States, Southern District of California, Southern Division.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Bill in Equity.

Now comes the above-named complainant and for cause of action against defendants above-named complains and alleges:

That complainant is now, and at all times hereinafter stated, was a citizen of the United States and of the State of New Jersey, and a resident of the State of New Jersey; that the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of them, now are, and at all times herein-

after mentioned were citizens of the United States and of the State of California, and residents of the State of California; that the amount in controversy between the plaintiff and defendants herein in this action exceeds, exclusive of costs and interest, the sum of Three Thousand Dollars ($3,000.00); that the real estate and placer mining claims affected by this suit are situate in San Bernardino County, State of California, that neither the said complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they or either of them been in the actual possession of the said placer mining claims, hereinafter particularly described. **[6]**

I.

That during the year 1910, plaintiff jointly with one H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins, D. Smith and defendant, Thos W. Pack, duly located and recorded forty-four certain placer mining claims, hereinafter more particularly described, situate in and upon Searles Borax Lake, County of San Bernardino, State of California; that plaintiff is now, and ever since the date of said locations has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims and each of them; that the said forty-four placer mining claims above referred to are more particularly described, named and numbered as follows, and are more fully described in said notices of locations, copies whereof are recorded in the office of the County Recorder of San Bernardino County, State of California, in Volume 82 of Mining Records,

at the pages of said volume hereinafter designated following the respective names of said placer mining claims, to wit:

"The Soda No. 1 Placer Mining Claim," at page 131 thereof;
"The Soda No. 2 Placer Mining Claim," at page 131 thereof;
"The Soda No. 3 Placer Mining Claim," at page 132 thereof;
"The Soda No. 4 Placer Mining Claim," at page 132 thereof;
"The Soda No. 5 Placer Mining Claim," at page 133 thereof;
"The Soda No. 6 Placer Mining Claim," at page 133 thereof;
"The Soda No. 7 Placer Mining Claim," at page 134 thereof;
"The Soda No. 8 Placer Mining Claim," at page 134 thereof;
"The Soda No. 9 Placer Mining Claim," at page 135 thereof;
"The Soda No. 10 Placer Mining Claim," at page 135 thereof;
"The Soda No. 11 Placer Mining Claim," at page 136 thereof;
"The Soda No. 12 Placer Mining Claim," at page 136 thereof;
"The Soda No. 13 Placer Mining Claim," at page 137 thereof;
"The Soda No. 14 Placer Mining Claim," at page 137 thereof;

[7]

"The Soda No. 15 Placer Mining Claim," at page 138 thereof;
"The Soda No. 16 Placer Mining Claim," at page 138 thereof;
"The Soda No. 17 Placer Mining Claim," at page 139 thereof;
"The Soda No. 18 Placer Mining Claim," at page 139 thereof;
"The Soda No. 19 Placer Mining Claim," at page 140 thereof;
"The Soda No. 20 Placer Mining Claim," at page 140 thereof;
"The Soda No. 21 Placer Mining Claim," at page 141 thereof;
"The Soda No. 22 Placer Mining Claim," at page 141 thereof;
"The Soda No. 23 Placer Mining Claim," at page 142 thereof;
"The Soda No. 24 Placer Mining Claim," at page 142 thereof;
"The Soda No. 25 Placer Mining Claim," at page 143 thereof;
"The Soda No. 26 Placer Mining Claim," at page 143 thereof;
"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 144 thereof;
"The Soda No. 29 Placer Mining Claim," at page 145 thereof;
"The Soda No. 30 Placer Mining Claim," at page 145 thereof;
"The Soda No. 31 Placer Mining Claim," at page 146 thereof;
"The Soda No. 48 Placer Mining Claim," at page 154 thereof;

"The Soda No. 49 Placer Mining Claim," at page 155 thereof;
"The Soda No. 50 Placer Mining Claim," at page 155 thereof;
"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof;

[8]

II.

That during the month of September, 1914, the above-named defendants caused to be served upon plaintiff, a paper which purports to be a notice of forfeiture, a copy of which said so-called "Notice of Forfeiture" is hereto attached, marked Exhibit "A" and made a part hereof. That in and by said pretended Notice of Forfeiture it appears that all of plaintiff's right, claim, title and interest in and to the said forty-four above described placer mining claims, and each thereof, will be forfeited and a cloud cast upon plaintiff's title thereto within ninety days from the date of service of said so-called Notice of Forfeiture upon this plaintiff, unless plaintiff, within said ninety days, pays to defendants or to defendant, Joseph K. Hutchinson, for said defendants, the sum of $550.00, claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack upon said claims in the year 1912 as recited in said pretended notice of forfeiture. (Exhibit "A").

III.

Plaintiff alleges that the said defendant, Thos. W. Pack, did not expend, or cause to be expended, during the year 1912, or during any other year, or at any other time, or at all, the sum of $4,400.00, or any part or portion thereof, or any other sum or sums or any sum at all of his own money or funds upon said forty-four above described placer mining claims, or upon any of them, or upon any placer mining claim or claims located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest, in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all. Plaintiff further alleges that the said Thos. W. Pack did not expend or cause [9] to be expended, during the year 1912, or during any other year, or at any other time, or at all, the sum of $100.00 or any part or portion thereof, of his own money or funds, or any other sum or sums, or any sum at all, upon each, or upon any or all of said above-described forty-four placer mining claims, or upon any placer mining claim or claims, located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all.

IV.

That said pretended Notice of Forfeiture does not, in any way, describe the kind, character or nature of the pretended labor and improvements, or labor or improvements, claimed to have been done and performed upon said claims, or any of them, during the year 1912, by the said Thos. W. Pack.

That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of $100.00, or the sum of $4,400.00 upon all of them, or any other sum or amount, or whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the year 1912; that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all **[10]** thereon, was the value of $100.00 for each claim, or of the value of $4,400.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of $100.00, or the value of them all in the sum of $4,400.00, or whether said pretended labor and improvements, or labor or improvements, tended in any

way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this plaintiff further alleges upon information and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the year 1912, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims.

That said pretended Notice is executed, made and signed by defendants Thos. W. Pack, S. Schuler and Joseph K. Hutchinson; that the same discloses upon its face that neither the said Schuler or the said Hutchinson, or either, or both of them, had any interest or ownership in or to the said placer mining claims mentioned therein, or in or to any part or portion of them, during the year 1912, or during the time it is claimed Thos. W. Pack expended money for labor and improvements thereon, and that neither the said S. Schuler, or the said Joseph K. Hutchinson ever expended, or caused to be expended the money named in said pretended Notice of Forfeiture, or any money thereon; [11]

V.

That on or about the 25th day of December, 1913, defendant S. Schuler made, executed, acknowledged and delivered her deed and conveyance to one J. A. Shellito, whereby she transferred and conveyed to said J. A. Shellito all of her right, title and interest in and to said above-described placer mining claims, together with her right, title and interest in and to certain other placer mining claims therein described; that thereafter and on or about the 14th day of January, 1914, the said defendant Schuler assumed to convey to defendant Hutchinson the same interest and property that she, the said defendant Schuler, had theretofore conveyed to the said J. A. Shellito, as hereinabove alleged; that the said defendant Hutchinson, at the time of receiving said conveyance was fully informed and had full knowledge that the said defendant Schuler had conveyed all the rights, interests, claims and property therein described to the said J. A. Shellito, a long time prior to the execution of said conveyance by said Schuler to said Hutchinson; that plaintiff further alleges that the said Hutchinson took said conveyance from the said defendant Schuler for the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or for all or a part of them, and not for his own use and benefit, and in pursuance of a combination and conspiracy by and between these defendants in this suit and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, where-

in and whereby the said defendants, and the said above-named corporations confederated and combined together to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said above-described placer mining claims. [12]

VI.

Plaintiff further alleges upon his information and belief that the pretended transfer of the said one-eighth interest of the said Thos. W. Pack in and to these said above-described claims by the said S. Schuler to the said Joseph K. Hutchinson, if such transfer was made at all, as set forth in said pretended Notice of Forfeiture, was made and done pursuant to and in order to carry out a combination and conspiracy to injure plaintiff and to deprive and defraud him of all of his right, title and interest in and to said placer mining claims and each and all of them; that the said pretended transfer to the said Joseph K. Hutchinson by the said S. Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration; that if any consideration at all was paid by the said Joseph K. Hutchinson to the said S. Schuler for the said transfer, the same was advanced and paid by the Foreign Mines and Development Company, a corporation, or by the American Trona Company, a corporation, or by the California Trona Company, a corporation, or by part or all of them, or by some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them; that the said Joseph K. Hutchinson took the

title to the said one-eighth interest in and to these said above-described claims, if he took the title at all, for the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and not for his own use and benefit; that the said Joseph K. Hutchinson now claims to hold the said title to the said one-eighth interest in and to the said above-described claims, if such title ever passed to him, for the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California [13] Trona Company, or for the sole use and benefit of part or all of them, and not for his own use and benefit.

Plaintiff further alleges that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim rights and interests in and to the mineral lands covered by said placer locations so made and recorded by plaintiff and others, as hereinabove alleged, and that said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by plaintiff and others, as hereinabove alleged, and that the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have, and each and every of them has, as plaintiff is informed and believes, fraudulently attempted to procure the right, title and interest of defendant, Pack, in and to said locations so made by

plaintiff and others as hereinabove alleged, for the express purpose, and none other, of using the said interest of the said Pack in and to said locations, in such a way and manner as to destroy all of plaintiff's rights and interest therein, and to defraud this plaintiff out of all interest in and to said claims, and each of them; this plaintiff further alleges on like information and belief that the defendant, Joseph K. Hutchinson, has been acting as the agent, representative and attorney of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, in endeavoring to deprive and defraud plaintiff of his rights and title in and to said placer mining locations, as above alleged; that the said defendant, Joseph K. Hutchinson, under the direction and orders of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, fraudulently obtained said transfer of the said one-eighth interest in and to said placer [14] mining claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, and the said defendants herein, and each of them, to injure plaintiff and defraud and deprive him of all of his right, title and interest in and to said claims, and each of them; that in further pursuance of said combination and conspiracy, and under the orders and

direction of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, said defendant Joseph K. Hutchinson, and the said defendants Schuler and Pack, caused to be served upon plaintiff the pretended Notice of Forfeiture above described (Exhibit "A"); that the fraudulent transfer of the said one-eighth interest in and to said claims by the said defendant Schuler to the said defendant, Hutchinson, if any transfer was made at all, and the serving of the said pretended Notice of Forfeiture upon the said plaintiff as aforesaid, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, and the said defendants, and each of them, confederated together for the purpose of injuring plaintiff and depriving and defrauding him of all his right, title and interest in and to said placer mining claims above described.

VII.

Plaintiff further alleges upon his information and belief that the said pretended Notice of Forfeiture was prepared and served upon him pursuant to and in the furtherance of such combination and conspiracy between defendants herein and the said [15] Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and that the said Thos. W. Pack, never, during the year 1912, or at any other time,

expended or caused to be expended, the sum of $4,400.00 of his own funds or money, or any other sum or amount in and upon said claims, or upon one, or any of them, for any purpose whatsoever, and that neither he nor any of the defendants herein, or their coconspirators are entitled to any contribution from plaintiff in any sum or amount whatsoever.

VIII.

That plaintiff is informed and believes that none of the money defendant Pack claims to have expended as and for representation work, or for labor and improvements, or labor or improvements, on the above described claims, or any thereof, if expended by the said Pack at all, was expended by him for the actual representation and assessment work upon the said claims, or any of them, as required by law; but plaintiff alleges that defendant Pack paid the moneys set forth in the said pretended Forfeiture Notice, if he paid any money at all, for certain goods, wares and merchandise, furnished to certain laborers, employed by plaintiff and his co-locators doing assessment work on said claims in the years 1911 and 1912, and for automobile hire in transporting said laborers and supplies to and from said placer mining claims.

IX.

That on the 14th day of January, 1913, one W. W. Colquhoun, through his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit against defendant Pack, one Henry E. Lee and one T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San [16] Francisco, which said suit is entitled "W. W. Col-

quhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, and Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, Defendants, and numbered 46,604 in the records of the Superior Court of the City and County of San Francisco, State of California; that in the verified complaint in said suit, plaintiff, W. W. Colquhoun, alleges that he is the assignor of C. J. and E. E. Teagle, and that the sum of $750.00 is due him for certain goods, wares and merchandise sold and delivered to the said Pack and the other two defendants named in said suit, during the years 1911 and 1912, and that the same had never been paid. This plaintiff alleges upon information and belief that the said goods sued for in said action were purchased by said Pack from C. J. and E. E. Teagle in the town of Johannesburg, Kern County, California; that the whole amount of said goods, wares and merchandise so purchased by the said Pack from the said Teagles was the sum of $969.00 and that the said Teagles admit that the sum of $219.00 has been paid upon said account; that this plaintiff further alleges upon his information and belief that the said sum of $750.00, sued for in said action, constitutes part of the amount which the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff and threatening a forfeiture of his rights

and interests in and to said above described placer mining claims, upon his failure so to contribute, as recited in their said pretended Notice of Forfeiture; that on the 4th day of February, 1914, a judgment was rendered in said suit against the said Pack, in favor of plaintiff, in the whole amount sued for, which said judgment [17] is now standing of record and docketed in Volume No. 29 of Judgments at page 484 of the records of the County Clerk of the City and County of San Francisco, State of California, and has never been satisfied or discharged, either in whole or in part, or set aside, vacated or modified.

X.

That on the 20th day of January, 1913, one M. A. Varney, by his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against defendant Thos. W. Pack, one Henry E. Lee and one T. O. Toland, which said suit was entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a co-partnership, Defendants," and numbered 46692 in the records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to defendant Thos. W. Pack and the other defendants therein, in the sum of $4,180.00, of which said sum only $535.00 had been paid; that there-

after and on or about the 4th day of February, 1913, a judgment was entered in said action against the said Thos. W. Pack, in favor of plaintiff, in the whole amount sued for. That plaintiff is informed and believes and therefore alleges the fact to be that said judgment in said suit is still standing of record and has never been satisfied, set aside, vacated or modified. That plaintiff is informed and believes and therefore alleges the fact to be that the last above named action was brought by the said M. A. Varney to recover the sum of $4,180.00 from the said Thos. W. Pack, Henry E. Lee and T. O. Toland, for the use of two certain automobiles and certain [18] supplies furnished by the said M. A. Varney to the said Thos. W. Pack, at his special instance and request, in the years 1911 and 1912, and used by the said Thos. W. Pack to transport men hired by plaintiff and his co-locators to do the annual assessment work on said above described placer claims for said years, and supplies for said men, from the City of Los Angeles and elsewhere to the above described placer claims on Searles Borax Lake, San Bernardino County, California; that plaintiff alleges upen his information and belief that the said sum of $4,180.00 sued for in said action, constitutes part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution

from this plaintiff, and threatening a forfeiture of his rights and interests to and to said above-described placer claims upon his failure so to contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XI.

That on the 2d day of September, 1913, one W. W. Colquhoun, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this plaintiff and H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith and S. Schuler, to recover the sum of $750.00 alleged to be due said plaintiff for the value of certain goods, wares and merchandise, which said suit is entitled in said Superior Court, "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a co-partnership, [19] and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50723 in the files and records of the said Superior Court; that in his verified complaint in said suit the said W. W. Colquhoun alleges that C. J. and E. E. Teagle assigned to him the said claims sued upon in said action; he further alleges that during the years 1911 and 1912 the said C. J. and E. E. Teagle furnished certain goods, wares and merchandise of the value of $750.00 to defendants therein, including this plaintiff, and that no part of said sum had been paid;

that plaintiff herein alleges the fact to be that said suit was brought by plaintiff for the value of the said goods, wares and merchandise claimed to have been sold and delivered by plaintiff's assignors to Thos. W. Pack in the years 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work upon the claims hereinabove described, together with other placer mining claims, during the years 1911 and 1912; that the whole amount of the value of said goods, so alleged to have been sold was $969.00, but that the said plaintiff in said suit admitted the payment of the sum of $219.00 on account. That thereafter and on or about the 27th day of October, 1913, R. Waymire filed his verified answer to the complaint in said action; that thereafter a trial was had of the issues therein, and after judgment had been entered against R. Waymire, the said Court on the 11th day of August, 1914, granted the motion of R. Waymire for a new trial thereof; that plaintiff in said suit, as this plaintiff is informed and believes, is now prosecuting an appeal from the order of said Court granting the said motion for a new trial. That plaintiff alleges upon his information and belief that the said sum of $750.00 sued for in said action, and the sum of $219.00 admitted to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their [20] said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of

which by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests in and to said above described claims upon his failure to so contribute, as recited in their said pretended Notice of Forfeiture.

XII.

That on the 30th day of August, 1913, one M. A. Varney, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack filed a suit in the Superior Court of the City and County of San Francisco, State of California, against H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith, S. Schuler and this plaintiff, which said suit is entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a co-partnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50724 in the files and records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of $4,170.00, of which said sum only $500.00 has been paid; that plaintiff alleges the fact to be that the said action was brought by the said M. A. Varney to recover the sum of $3,670.00 from the said defendants for the use of two certain automobiles and certain supplies furnished by the

said M. A. Varney to the said Pack at his special instance and request, in the years 1911 and 1912 and used by the said Pack to transport [21] men and supplies from the City of Los Angeles and elsewhere to the above described claims on Searles Borax Lake, San Bernardino County, California.

That thereafter and on or about the 20th day of October, 1913, R. Waymire filed his verified answer to the Complaint in said action; that thereafter various proceedings were had therein and a trial thereof was had before the Court, and that on or about the 16th day of July, 1914, R. Waymire moved the Court for a nonsuit in said action, which motion for nonsuit was by the Court granted; that on or about the 7th day of October, 1914, judgment was entered in favor of R. Waymire, which said judgment is now of record in the office of the Clerk of said Superior Court in Volume 77 of Judgments at page 93 thereof. That this plaintiff alleges upon his information and belief that the said sum of $3,670.00, sued for in said action, and the sum of $500.00 alleged to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which, by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's rights, title and interest in and to said placer mining claims, if he does not so

contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XIII.

That on or about the 26th day of February, 1914, one Raphael Mojica filed an action in the Superior Court in the City and County of San Francisco, State of California, against this plaintiff, his co-locators and defendant S. Schuler, as assignee of the defendant Pack, one Henry E. Lee and various other parties to [22] recover the sum of $1,443.50, which said action is entitled "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a co-partnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and is numbered 54989 in the files and records of said Superior Court; that in his verified complaint in said action the said plaintiff pretends to be the assignee of thirty certain Mexican laborers, and pretends therein that each of these said Mexican laborers named therein had assigned to him their claims against the defendants therein for doing certain labor and work, in and upon the above described placer claims by way of assessment work thereon, during the year 1912; that said action is now at issue in said Superior Court; that plaintiff is informed and believes and therefore alleges the fact

to be that the said sum of $1,443.50 sued for in said action constitutes a portion of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's right, title and interest in and to said placer mining claims if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"); that plaintiff is informed and believes that no part of said sum of $1,443.50 sued for in said action has been paid by the said Thos. W. Pack, or by anyone whomsoever for him. [23]

XIV.

That a short time prior to the dates when the said defendant Thos. W. Pack claims to have expended money for the purpose of doing assessment work on the above-described placer mining claims, as claimed in defendants' pretended Notice of Forfeiture (Exhibit "A"), one Henry E. Lee, as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant, Thos. W. Pack, for this plaintiff, and for his said co-locators, in their respective proportionate shares, the sum of $1,000.00, as a portion of their *pro rata* contribution for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and

used in said actual assessment work thereon; that as plaintiff is informed and believes the said Thos. W. Pack, did so use the said sum of $1,000.00 for said purpose in said year, and that the said amount should be credited to this plaintiff and his co-locators in proportion to their respective interests in the said placer mining claims.

XV.

That plaintiff further alleges that during the year 1911, and prior to the time any money is claimed to have been expended by the said defendant Pack in his said pretended Notice of Forfeiture (Exhibit "A"), the said defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, in the sum of $1,836.00, and that the said Henry E. Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of the placer mining claims hereinabove described in said pretended Notice of Forfeiture (Exhibit "A"), for the years 1911 and 1912, and that the [24] said defendant Pack agreed with the said Henry E. Lee that he would so utilize and use said money; that plaintiff claims that said sum of $1,836.00 is and should be a portion of the money expended by the said defendant Pack, as described in the said pretended Notice of Forfeiture (Exhibit "A"); that the said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, duly evidenced by his written

acknowledgment of such indebtedness to the said Henry E. Lee, the duly authorized agent of this plaintiff and his co-locators, and that said amount should be credited to this plaintiff and his co-locators in proportion to their respective interests in their said placer mining claims.

XVI.

Plaintiff further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A"), upon plaintiff, the said defendants served upon plaintiff another pretended Notice of Forfeiture, by the terms of which the said defendants claim that the defendant Pack expended during the years 1911 and 1912, the sum of $5,600.00 for labor and improvements upon one hundred and seventy-five placer claims, among which are included the placer claims in said Exhibit "A," and hereinbefore in this complaint described; that by the terms of said pretended Notice of Forfeiture, so served upon plaintiff simultaneously with the service of said Exhibit "A," as aforesaid, the said defendants claim contribution from this plaintiff twice for the same money and twice for the representation of the placer claims in this complaint specifically described.

XVII.

Plaintiff has no means of knowing or of ascertaining what, if any, amount of his own money or funds said defendant has expended [25] on said placer mining claims, or upon any of them, for annual representation work for the year 1912, and that the only method whereby plaintiff can procure said information is through this Court, and by its order

compelling the defendant, Thos. W. Pack, to account for and disclose any and all moneys expended or spent by him upon said placer mining claims, above described, or upon any of them, during the year 1912, for the purpose of representing same, and each and all thereof, for said year, if any money at all was so expended by the said Thos. W. Pack for such purpose, and whose money, if any, was expended by him, how expended, and what amount of the same, if any, was so expended and spent for labor and improvements, or labor or improvements upon the above-described claims, or upon any of them, which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to *pro rata* contribution from this plaintiff.

XVIII.

Plaintiff hereby and herewith offers and stands ready to pay to the said Thos. W. Pack, or these defendants, or either of them, his proportionate share of any moneys belonging to the said defendant Thos. W. Pack, which this Court finds were expended by the said Thos. W. Pack on the above-described claims, or any of them, as actual representation work thereon for the year 1912, if the Court finds he so expended any money at all for such purpose.

XIX.

That plaintiff further alleges that if the said defendants are allowed to proceed under said pretended Notice of Forfeiture (Exhibit "A"), they will, at the expiration of ninety days from and after

the date of the service of the said pretended Notice of Forfeiture, file and record a copy of said Notice of Forfeiture [26] (Exhibit "A"), and an affidavit of service, with the County Recorder of San Bernardino County, California, and claim and assert that all the right, title and interest of this plaintiff in and to said placer claims, and each and all thereof, has been duly and legally forfeited and extinguished and thereby and by means thereof a cloud will be cast upon the title and interest of this plaintiff in and to said placer mining claims, and each of them, and plaintiff be compelled to institute and prosecute a great number of suits to remove said cloud, at a great and exorbitant expense; that unless defendants are enjoined and restrained from proceeding to declare the forfeiture of plaintiff's rights in and to said placer claims and each of them as claimed in their said Notice of Forfeiture (Exhibit "A"), this plaintiff will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the clouds cast upon his said title and interest in and to each of said placer mining claims.

XX.

That plaintiff has no plain, speedy or adequate remedy at law in the premises, and unless defendants, and each of them, are restrained and enjoined from declaring a forfeiture of all of plaintiff's right, title and interest in and to said claims, and each thereof, pursuant to and in accordance with the pretended Notice of Forfeiture (Exhibit "A"), plaintiff will be irrevocably and irreparably damaged and

injured, and be defrauded or deprived of all of his right, title and interest in and to said placer mining claims, and each of them.

WHEREFORE plaintiff prays:

1. For a decree of this Court preventing any forfeiture of any [27] right, title, interest or claim of this plaintiff in and to said placer mining claims above described, and in and to each and all of them.

2. For a decree of this Court directing said defendants, and each of them, to account and disclose to this plaintiff, and to this Court, for all moneys, if any, belonging to the said Pack, and constituting his own personal funds, and used and expended by him in procuring labor or improvements, or labor and improvements, which could be legally counted, considered or claimed as a representation or annual assessment work for the year 1912, on the above described placer mining claims, and on each of them, and that this Court ascertain and determine the amount, if any thereof, and the proportion, if any, which this plaintiff should pay.

3. That these defendants, and each of them, their agents, attorneys, servants and employees be permanently restrained and enjoined from taking any steps to perfect or establish any forfeiture of plaintiff's rights, titles and interests in or to said placer mining claims, hereinabove described, or in or to any part or portion thereof, or any of them, and that in the meantime during the pendency of this suit, and until the final determination thereof on the merits, said defendants, and each of them, their attorneys, agents, servants, representatives or employees, and

each and all of them, be restrained and enjoined from taking any steps to cast a cloud upon the title, or to forfeit or to perfect or establish any forfeiture of plaintiff's rights, titles or interests in or to said placer mining claims hereinabove described, or any part or portion thereof, or any of them.

4. For plaintiff's costs of *siut*.

5. For such other and further relief as this Honorable Court may deem just and equitable in the premises.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant. [28]

In the District Court of the United States, Southern District of California.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

State of California,
City and County of San Francisco,—ss.

Henry E. Lee, being first duly sworn upon his oath says:

That he has read the complaint in the above-entitled action, to which this affidavit is attached, and knows the contents thereof; that he has personal knowledge of all the facts and matters therein alleged, and knows them to be true, except as to those

matters therein alleged upon information and belief, and as to them, he believes them to be true.

That he makes this affidavit for the plaintiff and on his behalf, for the reason that the said plaintiff is not a resident of the City and County of San Francisco, State of California, and is not at the date of the making of this affidavit within said State of California, or within the City and County of San Francisco wherein this affiant resides and has his office and place of business.

HENRY E. LEE,

Subscribed and sworn to before me this 21st day of November, 1914.

[Seal] H. B. DENSON,

Notary Public in and for the City and County of San Francisco, State of California. [29]

Exhibit "A" [to Bill in Equity].

NOTICE OF FORFEITURE.

710 Claus Spreckles Building,

San Francisco, California. September 14th, 1914.

E. THOMPSON:

You are hereby notified that I, the undersigned, T. W. PACK, expended during the year 1912 the sum of Forty-four Hundred Dollars ($4400), in amounts of One Hundred Dollars ($100), for labor and improvements, upon each of the forty-four (44) following described placer mining claims:

Those certain placer mining claims situate in and upon Searles Borax Lake, County of San Bernardino, State of California, more particularly named and numbered as follows:

"The Soda No. 1 Placer Mining Claim, to and including "The Soda No. 31 Placer Mining Claim," location notices of which said claims are recorded in Volume No. 82 of Mining Records of said County of San Bernardino, State of California, on pages numbers 131 to 146 inclusive, of said volume;

"The Soda No. 48 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 154 of said volume;

"The Soda No. 49 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 155 of said volume;

"The Soda No. 50 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 155 of said volume; [30]

"The Soda No. 67 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 164 of said volume;

"The Soda No. 70 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 165 of said volume;

"The Soda No. 73 Placer Mining Claim," the

location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 167 of said volume;

"The Soda No. 86 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page 173, of said volume;

"The Soda No. 92 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 176 of said volume;

"The Soda No. 93 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 177 of said volume;

"The Soda No. 113 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 187 of said volume;

"The Soda No. 114 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 187 of said volume; [31]

"The Soda No. 130 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San

Bernardino, State of California, at page number 195 of said volume;

"The Soda No. 218 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 218 of said volume.

You are hereby further notified that said sum of $4400 (being $100 for each of said claims) was expended by me for the purpose of complying with the requirements of Section 2324 of the Revised Statutes of the United States and amendments thereof, concerning the performance of annual labor upon mining claims.

You are hereby further notified that the amount of $100 was the amount required to hold each of said claims for the said year ending December 31st, 1912, and that said sum of $4400 was the aggregate amount required to hold said forty-four claims for said year 1912.

You are hereby further notified that throughout said year of 1912 I was the owner of an undivided one-eighth interest in said claims and therefore a co-owner with you throughout said period, during which you also were the owner of an undivided one-eighth interest in said claims.

You are hereby further notified that subsequent to the making of said expenditures I transferred my said one-eighth interest to S. Schuler, and that she has transferred said one-eighth interest to Joseph K. Hutchinson, who is now the owner thereof.

You are hereby further notified that I. T. W.

Pack, together with said S. Schuler, and said Joseph K. Hutchinson, also undersigned, having received no contribution from you for your proportion, to wit: one-eighth, of said expenditures, do, and each of us does hereby make demand upon you for contribution by you of [32] your proportion of said expenditures, to wit: of the sum of $550, or one-eighth of said sum of $4400.

You are hereby further notified that if, within ninety (90) days from the personal service of this notice upon you, you fail or refuse to contribute your proportion of said expenditure, to wit: $550, or one-eighth of said sum of $4400, by payment of the same to said Joseph K. Hutchinson, at Room 710, Claus Spreckels Building, City and County of San Francisco, State of California, he being duly authorized to collect said money and receipt for the same, your said interest in said mining claims, and each of them, will become the property of the undersigned.

Dated San Francisco, California, September 14, 1914.

(Signed) S. SCHULER,
T. W. PACK,
JOSEPH K. HUTCHINSON. [33]

[Endorsed]: No. B. 55–Eq. U. S. District Court, Southern District California, Southern Division. In Equity. E. Thompson, vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Bill in Equity. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. [34]

In the District Court of the United States, Southern District of California, Southern Division.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Restraining Order and Order to Show Cause.

WHEREAS, plaintiff above named has filed his verified bill in equity in the above-entitled cause against the defendants above named praying for certain equitable relief and an order of this Court restraining and enjoining defendants and each of them, during the pendency of this suit and until the final determination thereof upon its merits, from in any way or manner casting a cloud upon the title of or taking any steps toward forfeiting or declaring forfeited any of plaintiff's right, title or interest in and to certain placer mining claims in said bill of complaint and hereinafter fully described, named and numbered; and

WHEREAS, upon a reading of plaintiff's said bill of complaint it satisfactorily appears to the Court therefrom that plaintiff may suffer irreparable and irrevocable damage and injury, before the hearing of the order to show cause hereinafter set forth, unless, pending the hearing on said order to show cause, said defendants and each of them are by this Court restrained as hereinafter set forth, and other good cause appearing,

NOW THEREFORE, IT IS HEREBY ORDERED that you, the said defendants, [35] Thos. W. Pack, S. Schuler and Jos. K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees are hereby specially restrained and enjoined from in any way or manner taking any steps toward forfeiting or declaring a forfeiture of plaintiff's right, title and interest in and to certain hereinafter described placer mining claims, and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date hereof, served upon plaintiff herein, a copy of which is attached to the said bill of complaint and marked Exhibit "A," until the hearing of the application of plaintiff for an injunction *pendente lite* in this cause, which said application is hereby set for hearing before this Court on the 7th day of December, 1914, or until the further order of this Court;

IT IS FURTHER ORDERED that you and each of you appear before this Court at 10:30 o'clock A. M. on the 7th day of December, 1914, at the Courtroom of Division No. 2 of the District Court of the United States for the Southern District of California, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, and then and there to show cause, if any you have, why said restraining order, as hereinabove made, should not be made permanent during the pendency of this suit and until the final determination thereof on its merits.

Said placer mining claims above named are described, numbered and named as follows, being sit-

uate on Searles Borax Lake, County of San Bernardino, State of California, the location notices of which said placer claims are recorded in Volume 82 of Mining Records in the office of the County Recorder of the said County of San Bernardino, State of California, at the following respective pages of said Volume 82 set down opposite and following the hereinafter described, named and numbered placer mining claims:

[36]

"The Soda No. 1 Placer Mining Claim," at page 131 thereof;
"The Soda No. 2 Placer Mining Claim," at page 131 thereof;
"The Soda No. 3 Placer Mining Claim," at page 132 thereof;
"The Soda No. 4 Placer Mining Claim," at page 132 thereof;
"The Soda No. 5 Placer Mining Claim," at page 133 thereof;
"The Soda No. 6 Placer Mining Claim," at page 133 thereof;
"The Soda No. 7 Placer Mining Claim," at page 134 thereof;
"The Soda No. 8 Placer Mining Claim," at page 134 thereof;
"The Soda No. 9 Placer Mining Claim," at page 135 thereof;
"The Soda No. 10 Placer Mining Claim," at page 135 thereof;
"The Soda No. 11 Placer Mining Claim," at page 136 thereof;
"The Soda No. 12 Placer Mining Claim," at page 136 thereof;
"The Soda No. 13 Placer Mining Claim," at page 137 thereof;
"The Soda No. 14 Placer Mining Claim," at page 137 thereof;
"The Soda No. 15 Placer Mining Claim," at page 138 thereof;
"The Soda No. 16 Placer Mining Claim," at page 138 thereof;
"The Soda No. 17 Placer Mining Claim," at page 139 thereof;
"The Soda No. 18 Placer Mining Claim," at page 139 thereof;
"The Soda No. 19 Placer Mining Claim," at page 140 thereof;
"The Soda No. 20 Placer Mining Claim," at page 140 thereof;
"The Soda No. 21 Placer Mining Claim," at page 141 thereof;
"The Soda No. 22 Placer Mining Claim," at page 141 thereof;
"The Soda No. 23 Placer Mining Claim," at page 142 thereof;
"The Soda No. 24 Placer Mining Claim," at page 142 thereof;
"The Soda No. 25 Placer Mining Claim," at page 143 thereof;
"The Soda No. 26 Placer Mining Claim," at page 143 thereof;

"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 144 thereof;
"The Soda No. 29 Placer Mining Claim," at page 145 thereof;
"The Soda No. 30 Placer Mining Claim," at page 145 thereof;
"The Soda No. 31 Placer Mining Claim," at page 146 thereof;
[37]
"The Soda No. 48 Placer Mining Claim," at page 154 thereof;
"The Soda No. 49 Placer Mining Claim," at page 155 thereof;
"The Soda No. 50 Placer Mining Claim," at page 155 thereof;
"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof;

Dated this 24th day of November, 1914.

BENJAMIN F. BLEDSOE,
Judge. [38]

[Endorsed]: No. B. 55—Eq. U. S. District Court, Southern District California, Southern Division. In Equity. E. Thompson vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Restraining Order and Order to Show Cause. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. Eq. O Bk— [39]

[Order Continuing Hearing to Dec. 8, 1914.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the seventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; it is ordered that this cause be, and the same hereby is continued until Tuesday, the 8th day of December, 1914, at 10:30 o'clock, A. M., for said hearing. **[40]**

[Order Submitting Application for Preliminary Injunction.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the eighth day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having come on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; and said application for a preliminary injunction having been argued, in connection with the argument of the application for a preliminary injunction in cause No. B. 46—Equity, E. Thompson, Complainant, vs. Thomas W. Pack et al.,

Defendants, by Charles W. Slack, Esq., of counsel for defendants, and by A. V. Andrews, Esq., of counsel for complainant; it was ordered that this cause be, and the same thereby was submitted to the Court for its consideration and decision on complainant's application for a preliminary injunction and the argument thereof. [41]

[Order Granting Application for Injunction Pendente Lite, etc.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the eleventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; and the Court having duly considered the same and being fully ad-

vised in the premises, now, in accordance with the conclusions of the Court expressed in its opinion this day filed in cause No. B. 46—Equity, E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants, it is ordered that complainant's application for said temporary injunction be, and the same hereby is granted, counsel for complainant to prepare and present a suitable order in accordance herewith. [42]

[Opinion.]

In the District Court of the United States, in and for the Southern District of California.

C. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

This matter is before the Court on an order to show cause why a temporary injunction *pendente lite* should not issue restraining the defendants from putting of record certain Notices of forfeiture with Affidavits of Service thereof; such notices being those provided in Section 2324 Revised Statutes of the United States, and Section 1426–O of the Civil Code of the State of California, with reference to forfeiting of part interests of mining claims.

The bill in equity as filed contains much matter that seems to be immaterial, much that is purely "epithetic," to use an expressive phrase, and a great deal averred upon information and belief and not

positively. With respect to this latter the Court feels that it should not, of course, consider it upon this order to show cause, because of the fact that under the law the complainant, to be entitled to positive belief at this juncture, and in advance of a hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be said, that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing. Briefly summarized, they are: That the Plaintiff in the year nineteen hundred and ten, in conjunction with the Defendant Pack, [43] and certain other individuals mentioned, located and recorded one hundred and seventy-five certain Placer mining claims, situate in the County of San Bernardino, State of California; That plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; That during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; That said notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same

upon him, paid to the Defendants or to the defendant Joseph K. Hutchinson for said defendants, the sum of seven hundred dollars ($700.), claimed to be one eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; Plaintiff then alleges that the said Pack did not expend, or cause to be expended of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912) or at any other time the sum of fifty-six hundred dollars ($5600.), of which the said seven hundred dollars ($700.) was the one-eighth part, upon or for, the benefit of said placer mining claims, or at all; That at least twenty-eight hundred and thirty-six ($2836.) was contributed by plaintiff and his co-locators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen [44] hundred and eleven (1911) and nineteen hundred and twelve (1912): Plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American Trona Company and the California Trona Company: It is also alleged that in the year nineteen hundred and twelve (1912) while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said claims they were

forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company.

If these facts thus alleged be true, and at this time the Court must assume them to be true, because no a*ffadi*vit or answer in opposition to or in explanation of them, has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true would in its substantial aspects be in favor of the plaintiff. The only question for determination then, is whether or not the plaintiff should be protected in his rights, pending such final determination by the Court, and whether or [45] not the strong arm of the Court should be employed at this time to enjoin the defendants from placing of record, that which plaintiff claims would constitute a cloud upon his title, to wit: The notice of forfeiture with the

affidavit of service thereof. That it would constitute such a cloud, I think, is indisputably clear. It was held in Pixley v. Huggins, 15 Cal. 128, that the true test as to whether or not a certain instrument would cast a cloud upon the title, upon the plaintiff's property, was this: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed be required to offer evidence to defend a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed." This decision has been cited frequently and I apprehend states the law concisely. In this case it is apparent that the filing of the notice and affidivit of service, would *prima facie* serve to divest plaintiff of his interest in the properties and that it would require extrinsic evidence on his part to defeat a suit of ejectment, based upon the forfeiture apparently evidenced by the notice of labor done and failure to contribute thereto. For these reasons I am constrained to hold that plaintiff has presented a *prima facie* case, free from colorable doubt, is entitled to a temporary injunction *pendente lite.*

Plaintiff's counsel will draft an appropriate order.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: No. B. 46—Equity. United States District Court, Southern District of California, Southern Division. C. Thompson vs. Thomas W. Pack et al. Opinion re Injunction *Pendente Lite.*

Filed December 11, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [46]

[Order for Injunction Pendente Lite.]

District Court of the United States, Southern District of California.

B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

On the return of the order to show cause made by me in the above-entitled action on the 24th day of November, 1914, and returnable on the 7th day of December, 1914, and this cause coming on regularly for hearing on the return day thereof, upon the verified bill of complaint. After hearing Messrs. Clayberg & Whitmore for the complainants and Messrs. Charles W. Slack and Joseph K. Hutchinson, for the defendants, and no sufficient cause to the contrary being shown:

IT IS ORDERED that the said order to show cause be, and the same hereby is made absolute until the final determination of this suit. It is further Ordered, that you, the said defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees, are hereby specifically restrained and enjoined from in any way or manner

taking any steps towards forfeiting or declaring a forfeiture of plaintiff's right, title and interest in, and to those certain placer mining claims named and described in the Bill of Complaint filed herein and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date of the commencement of this suit served upon plaintiff herein, until the final hearing and termination of this suit or until the further order of this Court.

The Clerk will issue the Writs accordingly.

Dated this 11th day of December, 1914.

BENJAMIN F. BLEDSOE,
Judge of Said District Court. [47]

[Indorsed]: "No. B. 55—Equity. In the District Court of the United States in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Order for Injunction Pendente Lite. Filed Dec. 15, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Clayberg & Whitmore, Attorenys for Dfts. Eq. Order Book. [48]

In the District Court of the United States, in and for the Southern District of California.

B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Assignment of Error.

NOW COME THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON, defendants above named, and make and file this their assignment of error:

I.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of the 11th day of December, 1914, granting the application of the above-named complainant for a temporary injunction *pendente lite* in the above-entitled proceeding.

II.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of the 11th day of December, 1914, wherein and whereby it ordered that a temporary injunction *pendente lite* be issued in the above-entitled proceeding, restraining

the defendants in the above-entitled proceeding, and each of them, from filing affidavits of the service of the notice of forfeiture in the complaint on file in the above-entitled proceeding and in said temporary injunction *pendente lite* referred to and described. [49]

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants.

[Endorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Assignment of Error. (Order of Dec. 11, 1914.) Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [50]

In the District Court of the United States, in and for the Southern District of California.

B. 55—Equity.

E. THOMPSON,
Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Defendants.

Petition for an Order Allowing an Appeal.

The above-named defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, conceiving themselves aggrieved by the order entered on the 11th day of December, 1914, in the above-entitled proceeding, which said order granted the above-named complainant's application for a temporary injunction *pendente lite,* do, and each of them does, hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray, and each of them prays, that this, their appeal, may be allowed; and that a Transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants.

And now, to wit, on December 24th, 1914, it is ORDERED that the foregoing appeal be allowed as prayed for **[51]** upon giving bond in sum of $250.00 for costs on appeal.

BENJAMIN F. BLEDSOE,
District Judge.

[Endorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., De-

fendants. Petition for and Order Allowing Appeal (Order of Dec. 11, 1914.) Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. **[52]**

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That United States Fidelity & Guaranty Company, a corporation, duly incorporated under and by virtue of the laws of the State of Maryland and authorized by its charter and by law to become sole surety on bonds and undertakings, is held and firmly bound unto E. Thompson in the full and just sum of Two Hundred Fifty Dollars ($250.00), lawful money of the United States, to be paid to the said E, Thompson, her executors, administrators or assigns; to which payment the said United States Fidelity & Guaranty Company binds itself by these presents.

IN WITNESS WHEREOF, the United States Fidelity & Guaranty Company has caused these presents to be executed by its duly authorized attorney in fact and has caused these presents to be sealed with the seal of the United States Fidelity & Guaranty Company on this 24th day of December in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately, at a District Court of the United Sates, for the Southern District of California, Southern Division, [53] in a suit depending in said court between E. Thompson as Complainant, and Thomas W. Pack. Stella Schuler and Joseph K. Hutchinson as defendants, an order was entered on the 11th day of December, 1914, in the above-entitled proceeding, which said order granted the above-named complainant application for a temporary injunction *pendente lite*. And the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, having obtained from said court an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said E. Thompson citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, to wit: within thirty days after the 24th day of December, 1914.

Now, the condition of the above obligation is such that if the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obliga-

tion to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY COMPANY.

By VAN R. KELSEY,
Its Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 24th day of December, in the year one thousand nine hundred and fourteen before me, Hallie D. Winebrenner, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Van R. Kelsey, known to me to be the duly authorized Attorney-in-fact of THE UNITED STATES FIDELITY AND GUARANTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said Van R. Kelsey, duly acknowledged [54] to me that he subscribed the name of THE UNITED STATES FIDELITY AND GUARANTY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

HALLIE D. WINEBRENNER,
Notary Public in and for Los Angeles County, State of California.

(Cancelled Revenue Stamps, 2½¢.)
Premium on bond, $5.00.

[Endorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Undertaking on Appeal. The form of undertaking and sufficiency of surety approved. Benjamin F. Bledsoe, Judge. 12/25/14. Filed December 25, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Macomber & Pendleton, Attorneys, 915 Black Building, Los Angeles, Cal. A–2929, Main 5464. **[55]**

In the District Court of the United States, in and for the Southern District of California.

No. B. 55—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Praecipe for Record on Appeal.

To the Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division:

SIR:

You are hereby instructed to prepare a certified copy of the record in the above-entitled proceeding for use upon an appeal from the order heretofore given, made and entered in the above-entitled pro-

ceeding on the 11th day of December, 1914, granting the application of the above-named complainant for a temporary injunction *pendente lite* and ordering said injunction *pendente lite* to issue; said record will be made up of the following papers, records and proceedings in said above-entitled proceeding:

The bill of complaint therein;

The temporary restraining order and order to show cause given and made therein on the 24th day of November, 1914;

The minute order made in the above-entitled proceeding upon the return of said order to show cause on the 7th day of December, 1914, showing the making of a motion *ore tenus* on behalf of the defendants in the above-entitled proceeding to **[56]** dissolve said temporary restraining order, and submitting said aplication for an injunction *pendente lite* and said motion;

The minute order in the above-entitled proceeding given, made and entered upon the 11th day of December, 1914, granting the said complainant's application for an injunction *pendente lite*;

The order given, made and entered in said proceeding on the 11th day of December, 1914, which said order restrained and enjoined defendants above named from doing certain acts in said order and in the bill of complaint in the above-entitled proceeding more particularly set out and described, and ordered that an injunction *pendente lite* issue in the above-entitled proceeding;

The injunction *pendente lite* issued pursuant to said order of December 11, 1914, which said injunc-

tion was issued and is dated the 15th day of December, 1914;

The assignment of error of the above-named defendants filed with their petition for an order allowing the appeal above specified and referred to:

You will forthwith make up your certified copy of the foregoing papers and transmit the same, with the original petition for an order allowing an appeal and the citation issued thereon, with the return of the service of said citation, to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants, **[57]**

SERVICE OF THE WITHIN praecipe for Record on Appeal THIS 23d DAY OF December, 1914, is HEREY ADMITTED.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant.

[Endorsed]: No. B. 55–Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Praecipe for Record upon Appeal. (Order of Dec. 11, 1914.) Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. **[58]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 55–Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-eight (58) typewritten pages, numbered from 1 to 58 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the bill of complaint, temporary restraining order and order to show cause given and made on the 24th of November, 1914, minute orders of the 7th, 8th and 11th days of December, 1914, respectively, opinion of the court given in case B. 46–Equity, S. D., upon the making of the order granting application for injunction *pendente lite,* order of December 15, 1914, granting injunction *pendente lite,* assignment of error, petition for and order allowing appeal, undertaking on appeal, and praecipe for transcript of

record on appeal in the above and therein-entitled action; and I do further certify that the above constitute the record on appeal in said action as specified in the said praecipe for transcript of record on appeal, filed on behalf of the appellants in said action.

I do further certify that the cost of said transcript [59] is $32.90, the amount whereof has been paid me by Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, the appellants in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of December, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Ten Cents Internal Revenue Stamp. Canceled Dec. 30, 1914. Wm. M. V. D.] [60]

[Endorsed]: No. 2537. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2538

Rule Pending in 2535

United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

CECIL C. CARTER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Names and Addresses of Attorneys.

For Appellants:

JOS. K. HUTCHINSON, Esq., 923 First National Bank Building, San Francisco, California; and

CHAS. W. SLACK, Esq., 923 First National Bank Building, San Francisco, California.

For Appellee:

H. L. CLAYBERG, Esq., 937 Pacific Building, San Francisco, California;

Messrs. CLAYBERG & WHITMORE, 937 Pacific Building, San Francisco, California; and

R. P. HENSHALL, Esq., Los Angeles, California. [3*]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Cecil C. Carter, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson are appellants, and you are appellee, to show cause, if any there be, why the

*Page-number appearing at foot of page of original certified Record.

decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California, this 26 day of December A. D. 1914.

BENJAMIN F. BLEDSOE,
United States District Judge.

Due service and receipt of a copy of the within Citation on Appeal this 28th day of December, 1914, hereby admitted.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Solicitors for Complainant.

[Endorsed]: No. B. 58—Equity. United States District Court for the Southern District of California. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. Cecil C. Carter, Appellee. Citation on Appeal. Filed Dec. 29, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [4]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 58—EQUITY.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants. [5]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Bill in Equity.

Now comes the above-named complainant and for cause of action against defendants above named complains and alleges:

That complainant is now, and at all times hereinafter stated, was a citizen of the United States and of the State of Oregon, and a resident of the State of Oregon; that the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each

of them, now are, and at all times hereinafter mentioned were citizens of the United States and of the State of California, and residents of the State of California; that the amount in controversy between the plaintiff and defendants herein in this action exceeds, exclusive of costs and interest, the sum of Three Thousand Dollars ($3,000.00); that the real estate and placer mining claims affected by this suit are situate in San Bernardino County, State of California, that neither the said complainant nor the said defendants, or neither of them, are now, nor for a long time prior to the commencement of this suit, have they or either of them been in the actual possession of the said placer mining claims, hereinafter particularly described. [6]

I.

That during the year 1910, complainant's predecessor in interest, P. Perkins, jointly with one H. C. Fursman, W. Huff, H. A. Baker, E. Thompson, R. Waymire, D. Smith and defendant, Thos. W. Pack, duly located and recorded one hundred and seventy-five certain placer mining claims, hereinafter more particularly described, situat in and upon Searles Borax Lake, County of San Bernardino, State of California; that complainant is now, and ever since the 28th day of November, 1914, as hereinafter recited, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that the said placer mining claims above referred to are more particularly described, named and numbered as follows, and are more fully described in said notices of loca-

tions, copies whereof are recorded in the office of the County Recorder of San Bernardino County, State of California, in Volume 82 of Mining Records, at the pages of said volume hereinafter designated following the respective names of said placer mining claims, to wit:

"The Soda No. 1 Placer Mining Claim," at page 131 thereof;
"The Soda No. 2 Placer Mining Claim," at page 131 thereof;
"The Soda No. 3 Placer Mining Claim," at page 132 thereof;
"The Soda No. 4 Placer Mining Claim," at page 132 thereof;
"The Soda No. 5 Placer Mining Claim," at page 133 thereof;
"The Soda No. 6 Placer Mining Claim," at page 133 thereof;
"The Soda No. 7 Placer Mining Claim," at page 134 thereof;
"The Soda No. 8 Placer Mining Claim," at page 134 thereof;
"The Soda No. 9 Placer Mining Claim," at page 135 thereof;
"The Soda No. 10 Placer Mining Claim," at page 135 thereof;
"The Soda No. 11 Placer Mining Claim," at page 136 thereof;
"The Soda No. 12 Placer Mining Claim," at page 136 thereof;
"The Soda No. 13 Placer Mining Claim," at page 137 thereof;
"The Soda No. 14 Placer Mining Claim," at page 137 thereof;
"The Soda No. 15 Placer Mining Claim," at page 138 thereof;
"The Soda No. 16 Placer Mining Claim," at page 138 thereof;
"The Soda No. 17 Placer Mining Claim," at page 139 thereof;
"The Soda No. 18 Placer Mining Claim," at page 139 thereof;
"The Soda No. 19 Placer Mining Claim," at page 140 thereof;
"The Soda No. 20 Placer Mining Claim," at page 140 thereof;
"The Soda No. 21 Placer Mining Claim," at page 141 thereof;
"The Soda No. 22 Placer Mining Claim," at page 141 thereof;

[7]

"The Soda No. 23 Placer Mining Claim," at page 142 thereof;
"The Soda No. 24 Placer Mining Claim," at page 142 thereof;
"The Soda No. 25 Placer Mining Claim," at page 143 thereof;
"The Soda No. 26 Placer Mining Claim," at page 143 thereof;
"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 187 thereof;

"The Soda No. 29 Placer Mining Claim," at page 195 thereof;
"The Soda No. 30 Placer Mining Claim," at page 218 thereof;
"The Soda No. 31 Placer Mining Claim," at page 187 thereof;
"The Soda No. 32 Placer Mining Claim," at page 146 thereof;
"The Soda No. 33 Placer Mining Claim," at page 147 thereof;
"The Soda No. 34 Placer Mining Claim," at page 147 thereof;
"The Soda No. 35 Placer Mining Claim," at page 148 thereof;
"The Soda No. 36 Placer Mining Claim," at page 148 thereof;
"The Soda No. 37 Placer Mining Claim," at page 149 thereof;
"The Soda No. 38 Placer Mining Claim," at page 149 thereof;
"The Soda No. 39 Placer Mining Claim," at page 150 thereof;
"The Soda No. 40 Placer Mining Claim," at page 150 thereof;
"The Soda No. 41 Placer Mining Claim," at page 151 thereof;
"The Soda No. 42 Placer Mining Claim," at page 151 thereof;
"The Soda No. 43 Placer Mining Claim," at page 152 thereof;
"The Soda No. 44 Placer Mining Claim," at page 152 thereof;
"The Soda No. 45 Placer Mining Claim," at page 153 thereof;
"The Soda No. 46 Placer Mining Claim," at page 153 thereof;
"The Soda No. 47 Placer Mining Claim," at page 154 thereof;
"The Soda No. 48 Placer Mining Claim," at page 154 thereof;
"The Soda No. 49 Placer Mining Claim," at page 155 thereof;
"The Soda No. 50 Placer Mining Claim," at page 155 thereof;
"The Soda No. 51 Placer Mining Claim," at page 156 thereof;
"The Soda No. 52 Placer Mining Claim," at page 156 thereof;
"The Soda No. 53 Placer Mining Claim," at page 157 thereof;
"The Soda No. 54 Placer Mining Claim," at page 157 thereof;
"The Soda No. 55 Placer Mining Claim," at page 158 thereof;
"The Soda No. 56 Placer Mining Claim," at page 158 thereof;
"The Soda No. 57 Placer Mining Claim," at page 159 thereof;
"The Soda No. 58 Placer Mining Claim," at page 159 thereof;
"The Soda No. 59 Placer Mining Claim," at page 160 thereof;
"The Soda No. 60 Placer Mining Claim," at page 160 thereof;
"The Soda No. 61 Placer Mining Claim," at page 161 thereof;
"The Soda No. 62 Placer Mining Claim," at page 161 thereof;
"The Soda No. 63 Placer Mining Claim," at page 162 thereof;
"The Soda No. 64 Placer Mining Claim," at page 162 thereof;

"The Soda No. 65 Placer Mining Claim," at page 163 thereof;
"The Soda No. 66 Placer Mining Claim," at page 163 thereof;
"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 68 Placer Mining Claim," at page 164 thereof;
"The Soda No. 69 Placer Mining Claim," at page 165 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 71 Placer Mining Claim," at page 166 thereof;
"The Soda No. 72 Placer Mining Claim," at page 166 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 74 Placer Mining Claim," at page 167 thereof;
"The Soda No. 75 Placer Mining Claim," at page 168 thereof;
"The Soda No. 76 Placer Mining Claim," at page 168 thereof;
"The Soda No. 77 Placer Mining Claim," at page 169 thereof;
"The Soda No. 78 Placer Mining Claim," at page 169 thereof;
"The Soda No. 79 Placer Mining Claim," at page 170 thereof;
"The Soda No. 80 Placer Mining Claim," at page 170 thereof;

[8]

"The Soda No. 81 Placer Mining Claim," at page 171 thereof;
"The Soda No. 82 Placer Mining Claim," at page 171 thereof;
"The Soda No. 83 Placer Mining Claim," at page 172 thereof;
"The Soda No. 84 Placer Mining Claim," at page 172 thereof;
"The Soda No. 85 Placer Mining Claim," at page 173 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 87 Placer Mining Claim," at page 174 thereof;
"The Soda No. 88 Placer Mining Claim," at page 174 thereof;
"The Soda No. 89 Placer Mining Claim," at page 175 thereof;
"The Soda No. 90 Placer Mining Claim," at page 175 thereof;
"The Soda No. 91 Placer Mining Claim," at page 176 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 94 Placer Mining Claim," at page 177 thereof;
"The Soda No. 95 Placer Mining Claim," at page 178 thereof;
"The Soda No. 96 Placer Mining Claim," at page 178 thereof;
"The Soda No. 97 Placer Mining Claim," at page 179 thereof;
"The Soda No. 98 Placer Mining Claim," at page 179 thereof;
"The Soda No. 99 Placer Mining Claim," at page 180 thereof;

"The Soda No. 100 Placer Mining Claim," at page 180 thereof;
"The Soda No. 101 Placer Mining Claim," at page 181 thereof;
"The Soda No. 102 Placer Mining Claim," at page 181 thereof;
"The Soda No. 103 Placer Mining Claim," at page 182 thereof;
"The Soda No. 104 Placer Mining Claim," at page 182 thereof;
"The Soda No. 105 Placer Mining Claim," at page 183 thereof;
"The Soda No. 106 Placer Mining Claim," at page 183 thereof;
"The Soda No. 107 Placer Mining Claim," at page 184 thereof;
"The Soda No. 108 Placer Mining Claim," at page 184 thereof;
"The Soda No. 109 Placer Mining Claim," at page 185 thereof;
"The Soda No. 110 Placer Mining Claim," at page 185 thereof;
"The Soda No. 111 Placer Mining Claim," at page 186 thereof;
"The Soda No. 112 Placer Mining Claim," at page 186 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 115 Placer Mining Claim," at page 188 thereof;
"The Soda No. 116 Placer Mining Claim," at page 188 thereof;
"The Soda No. 117 Placer Mining Claim," at page 189 thereof;
"The Soda No. 118 Placer Mining Claim," at page 189 thereof;
"The Soda No. 119 Placer Mining Claim," at page 190 thereof;
"The Soda No. 120 Placer Mining Claim," at page 190 thereof;
"The Soda No. 121 Placer Mining Claim," at page 191 thereof;
"The Soda No. 122 Placer Mining Claim," at page 191 thereof;
"The Soda No. 123 Placer Mining Claim," at page 192 thereof;
"The Soda No. 124 Placer Mining Claim," at page 192 thereof;
"The Soda No. 125 Placer Mining Claim," at page 193 thereof;
"The Soda No. 126 Placer Mining Claim," at page 193 thereof;
"The Soda No. 127 Placer Mining Claim," at page 194 thereof;
"The Soda No. 128 Placer Mining Claim," at page 194 thereof;
"The Soda No. 129 Placer Mining Claim," at page 195 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 131 Placer Mining Claim," at page 196 thereof;
"The Soda No. 132 Placer Mining Claim," at page 196 thereof;
"The Soda No. 133 Placer Mining Claim," at page 197 thereof;
"The Soda No. 134 Placer Mining Claim," at page 197 thereof;
"The Soda No. 135 Placer Mining Claim," at page 198 thereof;

"The Soda No. 136 Placer Mining Claim," at page 198 thereof;
"The Soda No. 137 Placer Mining Claim," at page 199 thereof;
"The Soda No. 138 Placer Mining Claim," at page 199 thereof;
"The Soda No. 139 Placer Mining Claim," at page 200 thereof;

[9]

"The Soda No. 140 Placer Mining Claim," at page 200 thereof;
"The Soda No. 141 Placer Mining Claim," at page 201 thereof;
"The Soda No. 142 Placer Mining Claim," at page 201 thereof;
"The Soda No. 143 Placer Mining Claim," at page 202 thereof;
"The Soda No. 144 Placer Mining Claim," at page 202 thereof;
"The Soda No. 145 Placer Mining Claim," at page 203 thereof;
"The Soda No. 146 Placer Mining Claim," at page 203 thereof;
"The Soda No. 147 Placer Mining Claim," at page 204 thereof;
"The Soda No. 148 Placer Mining Claim," at page 204 thereof;
"The Soda No. 149 Placer Mining Claim," at page 205 thereof;
"The Soda No. 150 Placer Mining Claim," at page 205 thereof;
"The Soda No. 151 Placer Mining Claim," at page 206 thereof;
"The Soda No. 152 Placer Mining Claim," at page 206 thereof;
"The Soda No. 196 Placer Mining Claim," at page 207 thereof;
"The Soda No. 197 Placer Mining Claim," at page 207 thereof;
"The Soda No. 198 Placer Mining Claim," at page 208 thereof;
"The Soda No. 199 Placer Mining Claim," at page 208 thereof;
"The Soda No. 200 Placer Mining Claim," at page 209 thereof;
"The Soda No. 201 Placer Mining Claim," at page 209 thereof;
"The Soda No. 202 Placer Mining Claim," at page 210 thereof;
"The Soda No. 203 Placer Mining Claim," at page 210 thereof;
"The Soda No. 204 Placer Mining Claim," at page 211 thereof;
"The Soda No. 205 Placer Mining Claim," at page 211 thereof;
"The Soda No. 206 Placer Mining Claim," at page 212 thereof;
"The Soda No. 207 Placer Mining Claim," at page 212 thereof;
"The Soda No. 208 Placer Mining Claim," at page 213 thereof;
"The Soda No. 209 Placer Mining Claim," at page 213 thereof;
"The Soda No. 210 Placer Mining Claim," at page 214 thereof;
"The Soda No. 211 Placer Mining Claim," at page 214 thereof;
"The Soda No. 212 Placer Mining Claim," at page 215 thereof;
"The Soda No. 213 Placer Mining Claim," at page 215 thereof;

"The Soda No. 214 Placer Mining Claim," at page 216 thereof;
"The Soda No. 215 Placer Mining Claim," at page 216 thereof;
"The Soda No. 216 Placer Mining Claim," at page 217 thereof;
"The Soda No. 217 Placer Mining Claim," at page 217 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof;
[10]

II.

That on or about the 10th day of June, 1912, said P. Perkins, one of the original locators of said above described placer mining claims and the then holder and owner of a one-eighth undivided interest in and to said placer mining claims, together with Sylvia Perkins, his wife, transferred and deeded, for a valuable consideration, all of his said undivided one-eighth interest in and to said above described placer mining claims to one F. Kimball; that said deed was, on or about the 30th day of November, 1914, placed on record and recorded in Vol. 557 of deeds, at page 339 thereof, in the files and records of the office of the County Recorder of the County of San Bernardino, State of California; that on or about the 20th day of November, 1914, the said F. Kimball transferred and deeded for a valuable consideration all of the said one-eighth undivided interest in and to said above described placer mining claims, to this complainant; that said deed was, on or about the 7th day of December, 1914, placed on record and recorded in Vol. —— of deeds, at page —— thereof, in the files and records of the office of the County Recorder of the County of San Bernardino, State of California. That complainant is now, and ever since said 28th day of November, 1914, has been the owner and holder of said one-eighth undivided interest in

and to said above described placer mining claims, and the same now, at the date of the filing of this bill of complaint, stand of record in his name. [11]

III.

That some months prior to the commencement of this suit, and prior to the date of the service of the alleged Notice of Forfeiture, as hereinafter recited, the exact date of which is to this complainant unknown, complainant's predecessor in interest, the said P. Perkins, died in the State of Colorado; that at the time of his death, and for a long time prior thereto, the said P. Perkins was a resident and citizen of the State of Colorado; that as complainant is informed and believes, an administrator has been appointed in the State of Colorado to administer his estate, and that his estate is now in course of administration in said State of Colorado;

IV.

That during the month of September, 1914, the above-named defendants, as complainant is informed and believes, caused to be served upon the administrator, personal representative, executors or heirs of complainant's predecessor in interest, the said P. Perkins, a paper which purports to be a Notice of Forfeiture, a copy of which said so-called "Notice of Forfeiture" as complainant is informed and believes, is hereto attached, marked Exhibit "A" and made a part hereof. That in and by said pretended Notice of Forfeiture it appears that all of complainant's right, claim, title and interest and the right, title and interest of complainant's predecessors in interest, their administrators, representatives, heirs

and assigns, in and to the said one hundred and seventy-five above described placer mining claims, and each thereof, will be forfeited and a cloud cast upon complainant's title thereto within ninety days from the date of service of said so-called Notice of Forfeiture, as aforesaid, unless complainant or his predecessors in interest or their representatives, within said ninety days, pay to defendant, [12] Joseph K. Hutchinson, for said defendants, the sum of $700.00 claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack upon said claims in the years 1911 and 1912 as recited in said pretended notice of forfeiture (Exhibit "A").

V.

Complainant alleges that the said defendant, Thos. W. Pack, did not expend, or cause to be expended during the years 1911 and 1912, or during any other year, or at any other time, or at all, the sum of $5,600.00, or any part or portion thereof, or any other sum or sums or any sum at all of his own money or funds upon said one hundred and seventy-five above described placer mining claims, or upon any of them, or upon any placer mining claim or claims located and recorded by the predecessor in interest of this complainant, the said P. Perkins, or by the said P. Perkins and others, or in which this complainant or his predecessors in interest had or has any interest, in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all.

Complainant further alleges that the said Thos. W. Pack did not expend or cause to be expended, during the years 1911 and 1912, or during any other year, or at any other time, or at all, the sum of $100.00 *o* or any part or portion thereof, of his own money or funds, or any other sum or sums, or any sum at all, upon each, or upon any or all of said above described one hundred and seventy-five placer mining claims, or upon any placer mining claim or claims, located and recorded by complainant's predecessor in interest, the said P. Perkins, or by the said P. Perkins and others, or in which this complainant or his predecessors in interest had or has any interest in the County of San Bernardino, State of California, or elsewhere for labor and improvements, [13] or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all.

VI.

That said pretended Notice of Forfeiture does not, in any way, describe the kind, character or nature of the pretended labor and improvements, claimed to have been done and performed upon said claims, or any of them during the year 1912, by the said Thos. W. Pack.

That complainant is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of $100.00, or the sum of $5,600.00 upon all of them, or any

other sum or amount, or whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the years 1911 and 1912; that complainant cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all thereon, was the value of $100.00 for each claim, or of the value of $5,600.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of $100.00, or the value of them all in the sum of $56,000.00, or whether said pretended labor and improvements, or labor or improvements, tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; [14] that this complainant further alleges upon information and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the years 1911 and 1912 expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid, and in furnishing and supplying food, wear-

ing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims.

That said pretended notice is executed, made and signed by defendants Thos. W. Pack, S. Schuler and Joseph K. Hutchinson; that the same discloses upon its face that neither the said Schuler or the said Hutchinson, or either, or both of them, had any interest or ownership in or to the said placer mining claims mentioned therein, or on or to any part or portion of them, during the years 1911 and 1912, or during the time it is claimed Thos. W. Pack expended money for labor and improvements thereon, and that neither the said S. Schuler, or the said Joseph K. Hutchinson ever expended, or caused to be expended the money named in said pretended Notice of Forfeiture, or any money thereon;

VII.

That on or about the 25th day of December, 1913, defendant S. Schuler made, executed, acknowledged and delivered her deed and conveyance to one J. A. Shellito, whereby she transferred and conveyed to said J. A. Shellito all of her right, title and interest in and to said above-described placer mining claims, together with her right, title and interest in and to certain other placer mining claims, therein described; that thereafter and on [15] or about the 14th day of January, 1914, the said defendant Schuler assumed to convey to defendant Hutchinson the same interest and property that she, the said defendant Schuler, had theretofore conveyed to the

said J. A. Shellito, as hereinbefore alleged; that the said defendant Hutchinson, at the time of receiving said conveyance was fully informed and had full knowledge that the said defendant Schuler had conveyed all the rights, interests, claims and property therein described to the said J. A. Shellito, a long time prior to the execution of said conveyance by said Schuler to said Hutchinson; that complainant further alleges that the said Hutchinson took said conveyance from the said defendant Schuler for the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or for all or a part of them, and not for his own use and benefit, and for pursuance of a combination and conspiracy by and between these defendants in this suit and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, wherein and whereby the said defendants, and the said above-named corporations confederated and combined together to injure complainant and his predecessors in interest, and to deprive and defraud them of all their right, title and interest in and to said above-described placer mining claims.

VIII.

Complainant further alleges upon his information and belief that the pretended transfer of the said one-eighth interest of the said Thos. W. Pack in and to these said above-described claims by the said S. Schuler to the said Joseph K. Hutchinson, if such transfer was made at all, as set forth in said pre-

tended Notice of Forfeiture, was made and done pursuant to and in order to carry out a combination and conspiracy to [16] injure complainant and his predecessors in interest and to deprive and defraud them of all of their right, title and interest in and to said placer mining claims and each and all of them; that the said pretended transfer to the said Joseph K. Hutchinson by the said S. Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration; that if any consideration at all was paid by the said Joseph K. Hutchinson to the said S. Schuler for the said transfer, the same was advanced and paid by the Foreign Mines and Development Company, a corporation, or by the American Trona Company, a corporation, or by the California Trona Company, a corporation, or by part or all of them, or by some person or persons authorized by them, or part or all of them or acting for them, or for part or all of them and on their behalf, or on the behalf of part or all of them; that the said Joseph K. Hutchinson took the title to the said one-eighth interest in and to these said above-described claims, if he took the title at all, for the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and not for his own use and benefit; that the said Joseph K. Hutchinson now claims to hold the said title to the said one-eighth interest in and to the said above-described claims, if such title ever passed to him, for the sole and only use and benefit of the said

Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and not for his own use and benefit.

Complainant further alleges that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim rights and interest in and to the mineral lands covered by said placer locations so made and recorded by complainant's [17] predecessors in interest the said P. Perkins and others, as hereinabove alleged, and that said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by the said P. Perkins and others, as hereinabove alleged, and that the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have, and each and every of them has, as complainant is informed and believes, fraudulently attempted to procure the right, title and interest of defendant, Pack, in and to said locations so made by the said P. Perkins and others as hereinabove alleged for the express purpose, and none other, of using the said interest of the said Pack in and to said locations, in such a way and manner as to destroy all of complainant's rights and interest therein, and the right and interests of his predecessors in interest and to defraud this complainant and his predecessors in interest out of all interest in and to said claims, and each of them; this complainant further alleges on

like information and belief that the defendant, Joseph K. Hutchinson, has been acting as the agent, representative and attorney of the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, in endeavoring to deprive and defraud complainant and his predecessors in interest of their right and title in and to said placer mining locations, as above alleged; that the said defendant, Joseph K. Hutchinson, under the direction and orders of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, fraudulently obtained said transfer of the said one-eighth interest in and to said placer mining claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination [18] and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company and each of them, and the said defendants herein, and each of them, to injure complainant and his predecessors in interest and defraud and deprive them of all of their right, title and interest in and to said claims, and each of them; that in further pursuance of said combination and conspiracy, and under the orders and direction of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, said defendant Joseph K. Hutchinson, and the said defendants Schuler and Pack, caused to be served upon the administrator or personal repre-

sentative of the estate of P. Perkins complainant's predecessor in interest the pretended Notice of Forfeiture above described (Exhibit "A"); that the fraudulent transfer of the said one-eighth interest in and to said claims by the said defendant Schuler to the said defendant Hutchinson, if any transfer was made at all, and the serving of the said pretended Notice of Forfeiture upon the administrator or personal representative of the estate of P. Perkins as aforesaid, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, and the said defendants, and each of them, confederated together for the purpose of injuring complainant and his predecessors in interest and depriving and defrauding them of all their right, title and interest in and to said placer mining claims above described.

IX.

Complainant further alleges upon his information and belief that the said pretended Notice of Forfeiture was prepared [19] and served upon the said administrator or personal representative of the estate of the said P. Perkins, as aforesaid, pursuant to and in the furtherance of such combination and conspiracy between the defendants herein and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and that the said Thos. W. Pack never during the years 1911 and 1912, or at any other time,

expended or caused to be expended, the sum of $5600.00 of his own funds or money, or any other sum or amount in and upon said claims, or upon one, or any of them, for any purpose whatsoever, and that neither he nor any of the defendants herein, or their co-conspirators are entitled to any contribution from complainant or his predecessors in interest in any sum or amount whatsoever.

X.

That complainant is informed and believes that none of the money defendant Pack claims to have expended as and for representation work, or for labor and improvements, or labor or improvements, on the above-described claims, or any thereof, if expended by the said Pack at all, was expended by him for the actual representation and assessment work upon the said claims, or any of them, as required by law; but complainant alleges that defendant Pack paid the moneys set forth in the said pretended Forfeiture Notice, if he paid any money at all, for certain goods, wares, and merchandise, furnished to certain laborers, employed by the predecessor in interest of complainant and their colocators or co-owners doing assessment work on said claims in the years 1911 and 1912, and for automobile hire in transporting said laborers and supplies to and from said placer mining claims.

XI.

That on the 14th day of January, 1913, one W. W. Colquhoun, [20] through his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit against defendant Pack, one Henry E. Lee and

one T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San Francisco, which said suit is entitled, "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, and Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, Defendants," and numbered 46604 in the records of the Superior Court of the City and County of San Francisco, State of California; that in the verified complaint in said suit plaintiff, W. W. Colquhoun, alleges that he is the assignor of C. J. and E. E. Teagle, and that the sum of $750.00 is due him for certain goods, wares and merchandise sold and delivered to the said Pack and the other two defendants named in said suit, during the years 1911 and 1912, and that the same had never been paid. This complainant alleges upon information and belief that the said goods sued for in said action were purchased by said Pack from C. J. and E. E. Teagle in the town of Johannesburg, Kern County, California; that the whole amount of said goods, wares and merchandise so purchased by the said Pack from the said Teagles was the sum of $969.00 and that the said Teagles admit that the sum of $219.00 has been paid upon said account; that this complainant further alleges upon his information and belief that the said sum of $750.00 sued for in said action, constitutes part of the amount which the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above-described placer mining claims,

and for the pretended payment of which the said defendants are now seeking contribution from this complainant and his predecessors in interest and threatening a forfeiture of their rights [21] and interests in and to said above-described placer mining claims, upon their failure so to contribute, as recited in their said pretended Notice of Forfeiture; that on the 4th day of February, 1914, a judgment was rendered in said suit against the said Pack, in favor of the said W. W. Colquhoun, in the whole amount sued for which said judgment is now standing of record and docketed in Volume No. 29 of Judgments at page 484 of the records of the County Clerk of the City and County of San Francisco, State of California, and has never been satisfied or discharged, either in whole or in part, or set aside, vacated or modified.

XII.

That on the 20th day of January, 1913, one M. A. Varney, by his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against defendant Thos. W. Pack, one Henry E. Lee, and one T. O. Toland, which said suit was entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee, and T. O. Toland, a copartnership, Defendants," and numbered 46692 in the records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and

1912 he furnished supplies and rendered services to defendant Thos. W. Pack and the other defendants therein, in the sum of $4,180.00, of which said sum only $535.00 had been paid; that thereafter and on or about the 4th day of February, 1913, a judgment was entered in said action against the said Thos. W. Pack, in favor of the said M. A. Varney, in the whole amount sued for. That complainant is informed and believes and therefore alleges the fact to be that said judgment in said suit is still standing of record and has never [22] been satisfied, set aside, vacated or modified. That complainant is informed and believes and therefore alleges the fact to be that the last above-named action was brought by the said M. A. Varney to recover the sum of $4,180.00 from the said Thos. W. Pack, Henry E. Lee and T. O. Toland, for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Thos. W. Pack, at his special instance and request, in the years 1911 and 1912, and used by the said Thos. W. Pack to transport men hired by complainant's predecessors in interest and their co-locators and co-owners to do the annual assessment work on said above-described placer claims for said years, and supplies for said men, from the City of Los Angeles and elsewhere to the above-described placer claims on Searles Borax Lake, San Bernardino County, California; that complainant alleges upon his information and belief that the said sum of $4,180.00 sued for in said action, constitutes part of the amount the said defendants in this suit claim in their said pretended

Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911, for doing the assessment work on the above-described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this complainant and his predecessors in interest and threatening a forfeiture of their rights and interest *to* and to said above-described placer claims upon their failure so to contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XIII.

That on the 2d day of September, 1913, one W. W. Colquhoun, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the State of California, in and for the City and County of San [23] Francisco, against the predecessor in interest of this complainant the said P. Perkins and H. C. Fursman, W. Huff, R. Waymire, H. A. Baker, E. Thompson, D. Smith and S. Schuler, to recover the sum of $750.00 alleged to be due said plaintiff for the value of certain goods, wares and merchandise, which said suit is entitled in said Superior Court, "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, and S. Schuler, a copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50723 in the files and records of the said Superior Court; that in his verified complaint in

said suit the said W. W. Colquhoun alleges that C. J. and E. E. Teagle assigned to him the said claim sued upon in said action; he further alleges that during the years 1911 and 1912 the said C. J. and E. E. Teagle furnished certain goods, wares and merchandise of the value of $750.00 to defendants therein, including the said predecessor in interest of this complainant and that no part of said sum had been paid; that this complainant alleges the fact to be that said suit was brought by the said W. W. Colquhoun for the value of the said goods, wares and merchandise claimed to have been sold and delivered by said plaintiff's assignors to Thos. W. Pack in the years 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work upon the claims hereinabove described, together with other placer mining claims, during the years 1911 and 1912; that the whole amount of the value of said goods, so alleged to have been sold was $969.00, but that the said plaintiff in said suit admitted the payment of the sum of $219.00 on account. That thereafter and on or about the 27th day of October, 1913, R. Waymire filed his verified answer to the complaint in said action; that thereafter a trial [24] was had of the issues therein, and after judgment had been entered against R. Waymire, the said Court on the 11th day of August, 1914, granted the motion of R. Waymire for a new trial thereof; that plaintiff in said suit, as this complainant is informed and believes in now prosecuting an appeal from the order of said Court granting the said motion for a new trial. That complainant alleges, upon his informa-

tion and belief, that the said sum of $750.00 sued for in said action, and the sum of $219.00 admitted to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above-described placer mining claims, and for the pretended payment of which by the said Pack, and the said defendants are now seeking contribution from this complainant and his predecessors in interest and threatening a forfeiture of their rights and interests in and to said above-described claims upon their failure to so contribute, as recited in their said pretended Notice of Forfeiture.

XIV.

That on the 30th day of August, 1913, one M. A. Varney, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against H. C. Fursman, W. Huff, R. Waymire, H. A. Baker, E. Thompson, D. Smith, S. Schuler and this complainant's predecessor in interest, P. Perkins, which said suit is entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals. [25] Defendants," and numbered 50724 in the files and records of the said Superior

Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of $4,170.00, of which said sum only $500.00 has been paid; that this complainant alleges the fact to be that the said action was brought by the said M. A. Varney to recover the sum of $3,670.00 from the said defendants for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Pack at his special instance and request, in the years 1911 and 1912 and used by the said Pack to transport men and supplies from the City of Los Angeles and elsewhere to the above-described claims on Searles Borax Lake, San Bernardino County, California.

That thereafter and on or about the 20th day of October, 1913, R. Waymire filed his verified answer to the Complaint in said action; that thereafter various proceedings were had therein and a trial thereof was had before the Court, and that on or about the 16th day of July R. Waymire moved the Court for a nonsuit in said action, which motion for nonsuit was by the Court granted; that on or about the 7th day of October, 1914, judgment was entered in favor of R. Waymire which said judgment is now of record in the office of the Clerk of said Superior Court in Volume 77 of Judgments at page 93 thereof. That this complainant alleges upon his information and belief that the said sum of $3,670.00, sued for in said action, and the sum of $500.00 alleged to have been paid on account therein, constitute part of the

amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the years 1911 and 1912 for doing the assessment work on the above-described placer mining claims, and for the pretended [26] payment of which, by the said Pack, the said defendants are now seeking contribution from this complainant and his predecessors in interest, and threatening to forfeit all of complainant's rights, title and interest and the rights, title and interest of complainant's predecessors in interest in and to said placer mining claims, if they do not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XV.

That on or about the 26th day of February, 1914, one Raphael Mojica filed an action in the Superior Court in the City and County of San Francisco, State of California, against complainant's predecessor in interest, the said P. Perkins, his colocators and defendant S. Schuler, as assignee of the defendant Pack, one Henry E. Lee, and various other parties to recover the sum of $1,443.50, which said action is entitled "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a copartnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe,

Jane Roe, Richard Roe and Mary Roe, Defendants," and is numbered 54989 in the files and records of said Superior Court; that in his verified complaint in said action the said plaintiff pretends to be the assignee of thirty certain Mexican laborers, and pretends therein that each of these said Mexican laborers named therein had assigned to him their claims against the defendants therein for doing certain labor and work, in and upon the above-described placer claims by way of assessment work thereon, during the year 1912; that said action is now at issue in said Superior [27] Court; that complainant is informed and believes and therefore alleges the fact to be that the said sum of $1,443.50 sued for in said action constitutes a portion of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the years 1911 and 1912, for doing the assessment work on the above-described placer mining claims and for the pretended payment of which the said defendants are now seeking contribution from this complainant and his predecessors in interest, and threatening to forfeit all of complainant's right, title and interest and the right, title and interest of his predecessors in interest in and to said placer mining claims if they do not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"); that complainant is informed and believes that no part of said sum of $1,443.50 sued for in said action has been paid by the said Thos. W. Pack, or by anyone whomsoever for him.

XVI.

That a short time prior to the dates when the said defendant Thos. W. Pack claims to have expended money for the purpose of doing assessment work on the above-described placer mining claims, as claimed in defendant's pretended Notice of Forfeiture (Exhibit "A"), one Henry E. Lee, as the duly authorized agent and representative of the predecessors in interest of this complainant, and of his colocators paid to the said defendant Thos. W. Pack for complainant's predecessors in interest and for his said colocators and co-owners, in their respective proportionate shares, the sum of $1,000.00, as a portion of their *pro rata* contribution for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon; that as [28] complainant is informed and believes the said Thos. W. Pack, did so use the said sum of $1,000.00 for said purpose in said year and that the said amount should be credited to this complainant and his predecessors in interest and their colocators and co-owners in proportion to their respective interests in the said placer mining claims.

XVII.

That complainant further alleges that during the year 1911, and prior to the time any money is claimed to have been expended by the said defendant Pack in his said pretended Notice of Forfeiture (Exhibit "A"), the said defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of complainant's prede-

cessors in interest, and their colocators and co-owners, in the sum of $1,836.00, and that the said Henry E. Lee, acting as such agent for complainant's predecessors in interest and their colocators and co-owners, directed the said defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of the placer mining claims hereinabove described in said pretended Notice of Forfeiture (Exhibit "A") for the years 1911 and 1912, and that the said defendant Pack agreed with the said Henry E. Lee that he would so utilize and use said money; that complainant claims that said sum of $1,836.00 is and should be a portion of the money expended by the said defendant Pack, as described in the said pretended Notice of Forfeiture (Exhibit "A"); that the said money and indebtedness was money due and owing to the predecessors in interest of this complainant and their colocators and co-owners from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Henry E. Lee, the duly authorized agent of this complainant's predecessors [29] in interest, and their colocators and co-owners, and that said amount should be credited to this complainant and his predecessors in interest and their colocators and co-owners, in proportion to their respective interests in the said placer mining claims.

XVIII.

Complainant further alleges that in and by the terms of said pretended Notice of Forfeiture (Exhibit "A") it is not disclosed that the said defendant

Pack, or either of the other said defendants, or anyone in their behalf, or in behalf of either of them, ever expended the sum of $100.00 on each or any of the placer claims described in said pretended Notice of Forfeiture (Exhibit "A"); that by said pretended Notice of Forfeiture (Exhibit "A") it is claimed by the defendants in this action that $5,600.00 was expended for annual representation of one hundred seventy-five placer mining claims described in said pretended Notice of Forfeiture, for the years 1911 and 1912, while in truth and in fact the Statutes of the United States and of the State of California require that $100.00 in labor or improvements be placed upon each separate claim for each separate year and that the sum of $35,000.00 would be required by said Statutes above referred to, to fully represent each and all of said one hundred seventy-five claims for the two years 1911 and 1912; that it is not claimed in said pretended Notice of Forfeiture (Exhibit "A") and cannot be ascertained therefrom upon which separate placer mining claim or claims, out of the one hundred seventy-five placer mining claims described therein, said defendant Pack, or either of said defendants, claim to have expended any money for labor or improvements in the annual representation for either of said years 1911 and 1912; that it does not appear from said pretended [30] Notice of Forfeiture (Exhibit "A") and it cannot be ascertained therefrom, which particular placer claim or claims was represented by the said Pack, or by either of said defendants, if any were represented at all, either for the year 1911 or

for the year 1912; that it does not appear from said pretended Notice of Forfeiture (Exhibit "A") and it cannot be ascertained therefrom, how much money, if any, the said defendant Pack, or either of said defendants, expended in labor or improvements, on any of said placer claims, either for the year 1911 or for the year 1912; that it does not appear from said pretended Notice of Forfeiture (Exhibit "A") and it cannot be ascertained therefrom whether the said defendant Pack, or either of said defendants, expended the sum of $100.00 in labor or improvements upon either of said placer claims, either for the year 1911 or 1912, or whether the said $5,600.00 so claimed to have been expended by said defendant Pack was expended upon all of said claims, or upon which of said one hundred seventy-five placer claims, and if so expended, how much of the same was expended upon either or any of said one hundred seventy-five claims;

XIX.

This complainant further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") upon the administrator or personal representative of the estate of P. Perkins, as aforesaid, the said defendants caused to be served upon the said administrator or personal representative of the said estate of P. Perkins, as complainant is informed and believes, two other and further pretended Notices of Forfeiture, by one of which the said defendant Pack, and each and all of said defendants, claimed that said defendant Pack had expended the sum of $1,200,00 upon twelve of said

one hundred seventy-five placer claims, described in said Exhibit "A," namely the Soda [31] Placer Mining Claims numbered 68, 69, 70, 71, 72, 87, 88, 89, 90, 91, 111 and 112, in the annual representation of said claims for the year 1911.

XX.

This complainant further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") upon the administrator or personal representative of the estate of P. Perkins, as aforesaid, the said defendants caused to be served upon the said administrator or personal representative of the said estate of P. Perkins, as complainant is informed and believes, two other and further pretended Notices of Forfeiture, by one of which the said defendant Pack, and each and all of said defendants, claimed that said defendant Pack had expended the sum of $4,400.00 upon forty-four of said one hundred and seventy-five placer claims, described in said Exhibit "A," namely the Soda Placer Mining Claims numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 48, 49, 50, 67, 70, 73, 86, 92, 93, 113, 114, 130 and 218, in the annual representation of said claims for the year 1912.

XXI.

That complainant is informed and believes and therefore alleges that the $5,600.00 which said defendant Pack, and each and all of the other said defendants claim as having been expended by said Pack upon said one hundred seventy-five placer claims in the years 1911 and 1912 is the same money

and cash as the $1,200.00 and $4,400.00 claimed to have been expended by said Pack in doing the annual representation work upon said twelve placer claims for the year 1911 and said forty-four placer claims for the year 1912, as set forth in the said other pretended Notices [32] of Forfeiture above described, and therefore this complainant claims that none of said defendants, and neither of them, are entitled to any contribution from this complainant or his predecessors in interest under said pretended Notice of Forfeiture (Exhibit "A").

XXII.

Complainant further alleges that while complainant's predecessors in interest and their colocators and co-owners were engaged in the performance of the annual representation upon said one hundred seventy-five placer claims for the year 1912, they were forcibly prevented from completing said annual representation upon the whole of said one hundred seventy-five placer claims by the Foreign Mines and Development Company, American Trona Company and the California Trona Company, or by each and all of said corporations, or by their or each of their agents, employees, representatives, servants or attorneys, and that the employees of this complainant's predecessors in interest and their colocators, and the persons representing complainant's predecessors in interest and their colocators and co-owners in doing said annual representation upon said one hundred seventy-five placer claims for the year 1912, were forcibly ejected and driven from said placer claims by the said Foreign Mines and Development Com-

pany, the American Trona Company and the California Trona Company, or by each or all of them, or by their or each of their agents, representatives, employees, servants or attorneys, and threatened with great physical violence and injury in case they or any of them returned to said placer claims, or any of them, or attempted to place upon said claims, or any of them, any labor or improvements in the annual representation thereof for the year 1912; complainant therefore claims that [33] none of said defendants, and neither of them, are entitled to any contribution from this complainant or his predecessors in interest, for the annual representation of said one hundred seventy-five placer claims, or either of them, for the years 1911 and 1912.

XXIII.

Complainant has no means of knowing or of ascertaining what, if any, amount of his own money or funds said defendant has expended on said placer mining claims, or upon any of them, for annual representation work for the years 1911 and 1912, and that the only method whereby complainant can procure said information is through this Court and by its order compelling the defendant, Thos. W. Pack, to account for and disclose any and all moneys expended or spent by him upon said placer mining claims, above described, or upon any of them, during the years 1911 and 1912, for the purpose of representing same, and each and all thereof, for said year, if any, money at all was so expended by said Thos. W. Pack for such purpose, and whose money, if any, was expended by him, how expended, and what

amount of the same, if any was so expended and spent for labor and improvements, or labor or improvements *u* upon the above-described claims, or upon any of them, which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitle to *pro rata* contribution from this complainant and his predecessors in interest.

XXIV.

Complainant hereby and herewith offers and stands ready to pay to the said Thos. W. Pack, or these defendants, or either of them, his proportionate share of any moneys belonging to the said defendant Thos. W. Pack which this Court finds were expended by the said Thos. W. Pack on the above-described claims, or any of them, as actual representation work thereon for the years [34] 1911 and 1912, if the Court finds he so expended any money at all for such purpose.

XXV.

Complainant further alleges that if the said defendants are allowed to proceed under said pretended Notice of Forfeiture (Exhibit "A") they will, at the expiration of ninety days from and after the date of the service of the said pretended Notice of Forfeiture, file and record a copy of said Notice of Forfeiture (Exhibit "A") and an affidavit of service, with the County Recorder of San Bernardino County, California, and claim and assert that all the right, title and interest of this complainant and his predecessors in interest in and to said placer claims, and each and all thereof, has been duly and

legally forfeited and extinguished and thereby and by means thereof a cloud will be cast upon the title and interest of this complainant, and his predecessors in interest in and to said placer mining claims, and each of them, and complainant be compelled to institute and prosecute a great number of suits to remove said cloud, at a great and exorbitant expense; that unless defendants are enjoined and restrained from proceeding to declare the forfeiture of complainant's rights and the rights of his predecessors in interest in and to said placer claims and each of them as claimed in their said Notice of Forfeiture (Exhibit "A") this complainant will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the clouds cast upon his said title and interest in and to each of said placer mining claims.

XXVI.

That complainant has no plain, speedy, or adequate remedy at law in the premises, and unless defendants, and each of them, are restrained and enjoined from declaring a forfeiture of [35] all of his right, title and interest and the rights, title and interest of his predecessors in interest in and to said claims, and each thereof, pursuant to and in accordance with the pretended Notice of Forfeiture (Exhibit "A"), complainant will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all of his right, title and interest in and to said placer mining claims, and each of them.

WHEREFORE, complainant prays:

1. For a decree of this Court preventing any for-

feiture of any right, title, interest or claim of this complainant or his predecessors in interest in and to said placer mining claims above described, and in and to each and all of them.

2. For a decree of this Court directing said defendants, and each of them, to account and disclose to this complainant, and to this Court, for all moneys, if any, belonging to the said Pack and constituting his own personal funds, and used and expended by him in procuring labor or improvements, or labor or improvements, which could be legally counted, considered or claimed as a representation or annual assessment work for the years 1911 and 1912, on the above-described placer mining claims, and on each of them, and that this Court ascertain and determine the amount, if any, thereof, and the proportion, if any, which this complainant should pay.

3. That these defendants, and each of them, their agents, attorneys, servants and employees be permanently restrained and enjoined from taking any steps to perfect or establish any forfeiture of complainant's rights, titles, and interests, or the rights, titles and interests of his predecessors in interest, in or to said placer mining claims, hereinabove described, or in or to any part or portion thereof, or any of them, and that in the [36] meantime during the pendency of this suit, and until the final determination thereof on the merits, said defendants, and each of them, their attorneys, agents, servants, representatives or employees, and each and all of them, be restrained and enjoined from taking any steps to cast a cloud upon the title, or to forfeit or

to perfect or establish any forfeiture of complainant's rights, titles or interests or the rights, titles or interests of his predecessors in interest in or to said placer mining claims hereinabove described, or any part or portion thereof, or any of them.

4. For complainant's costs of suit.

5. For such other and further relief as this Honorable Court may deem just and equitable in the premises.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant. [37]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

State of California,
City and County of San Francisco,—ss.

Henry E. Lee, being first duly sworn upon his oath, says:

That he has read the complaint in the above-entitled action, to which this affidavit is attached, and knows the contents thereof; that he has personal knowledge of all the facts and matters therein alleged, and knows them to be true, except as to those matters therein alleged upon information and belief,

and as to them, he believes them to be true.

That he makes this affidavit for the plaintiff and on his behalf, for the reason that the said plaintiff is not a resident of the City and County of San Francisco, State of California, and is not at the date of the making of this affidavit within said State of California, or within the City and County of San Francisco wherein this affiant resides and has his office and place of business.

HENRY E. LEE,

Subscribed and sworn to before me, this 11th day of December, 1914.

[Seal] J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [38]

Exhibit "A" [to Bill in Equity].

NOTICE OF FORFEITURE.

710 Claus Spreckels Building.

San Francisco, California,

September, 14th, 1914.

George W. Irwin, Administrator of the Estate of P. Perkins, Deceased:

You are hereby notified that I, the undersigned, T. W. PACK, expended during the year 1912 the sum of Forty-four Hundred Dollars ($4400), in amounts of One Hundred Dollars ($100), for labor and improvements, upon each of the forty-four (44) following described placer mining claims:

Those certain placer mining claims situate in and upon Searles Borax Lake, County of San Bernardino, State of California, more particularly named and numbered as follows:

"The Soda No. 1 Placer Mining Claim" to and including "The Soda No. 31 Placer Mining Claim," location notices of which said claims are recorded in Volume No. 82 of Mining Records of said County of San Bernardino, State of California, on pages numbers 131 to 146 inclusive, of said volume;

"The Soda No. 48 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 154 of said volume;

"The Soda No. 49 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 155 of said volume;

"The Soda No. 50 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 155 of said volume;

"The Soda No. 67 Placer Mining Claim," the location notice [39] of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 164 of said volume;

"The Soda No. 70 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 165 of said volume;

"The Soda No. 73 Placer Mining Claim," the loca-

tion notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 167 of said volume;

"The Soda No. 86 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 173 of said volume;

"The Soda No. 92 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 176 of said volume;

"The Soda No. 93 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 177 of said volume;

"The Soda No. 113 Placer Mining Claim," the location notice of which claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 187 of said volume;

"The Soda No. 130 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 218 of said volume.

You are hereby further notified that said sum of $4400 (being $100 for each of said claims), was expended by me for the purpose [40] of complying

with the requirements of Section 2324 of the Revised Statutes of the United States and amendments thereof, concerning the performance of annual labor upon mining claims.

You are hereby further notified that the amount of $100 was the amount required to hold each of said claims for the said year ending December 31st, 1912, and that said sum of $4400 was the aggregate amount required to hold said forty-four claims for said year 1912.

You are hereby further notified that throughout said year of 1912 I was the owner of an undivided one-eighth interest in said claims and therefore a co-owner with you throughout said period, during which you also were the owner of an undivided one-eighth interest in said claims.

You are hereby further notified that subsequent to the making of said expenditures I transferred my said one-eighth interest to S. Schuler, and that she has transferred said one-eighth interest to Joseph K. Hutchinson, who is now the owner thereof.

You are hereby further notified that I, T. W. Pack, together with said S. Schuler, and said Joseph K. Hutchinson, also undersigned, having received no contribution from you for your proportion, to wit: one-eighth, of said expenditures, do, and each of us does hereby make demand upon you for contribution by you of your proportion of said expenditures, to wit: of the sum of $550, or one-eighth of said sum of $4400.

You are hereby further notified that if, within ninety (90) days from the personal service of this

notice upon you, you fail or refuse to contribute your proportion of said expenditure, to wit: $550, or one-eighth of said sum of $4400, by payment of the same to said Joseph K. Hutchinson, at Room 710, Claus Spreckels Building, City and County of San Francisco, State of California, he being duly authorized to collect said money and receipt for the same, your said interest in said mining claims, and each of them, will become the property of the undersigned. [41]

Dated, San Francisco, California, September 14, 1914.

(Signed) S. SCHULER.
T. W. PACK.
JOSEPH K. HUTCHINSON.

[Endorsed]: No. B. 58—Eq. U. S. District Court, Southern District California, Southern Division. In Equity. Cecil C. Carter vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Bill of Complaint. Filed Dec. 12, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. [42]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Restraining Order and Order to Show Cause.

Whereas, plaintiff above named has filed his verified bill in equity in the above-entitled cause against the defendants above named praying for certain equitable relief and an order of this Court restraining and enjoining defendants and each of them during the pendency of this suit and until the final determination thereof upon its merits, from in any way or manner casting a cloud upon the title of or taking any steps toward forfeiting or declaring forfeited any of plaintiff's right, title or interest in and to certain placer mining claims in said bill of complaint and hereinafter fully described, named and numbered; and

Whereas, upon a reading of plaintiff's said bill of complaint it satisfactorily appears to the Court therefrom that plaintiff may suffer irreparable and irrevocable damage and injury, before the hearing of the order to show cause hereinafter set forth, unless, pending the hearing on said order to show cause, said defendants and each of them are by this Court restrained as hereinafter set forth, and other good cause appearing. [43]

NOW, THEREFORE, IT IS HEREBY ORDERED that you, the said defendants, Thos. W. Pack, S. Schuler and Jos. K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees are hereby specially restrained and enjoined from in any way or manner taking any steps toward forfeiting or declaring a forfeiture of

plaintiff's right, title and interest in and to certain hereinafter described placer mining claims, and each of them, pursuant to or in accordance with your pretended notice of forfeiture heretofore, and within ninety days prior to the date hereof, served upon plaintiff herein, a copy of which is attached to the said bill of complaint and marked Exhibit "A," until the hearing of the application of plaintiff for an injunction *pendente lite* in this cause, which said application is hereby set for hearing before this Court on the 21 day of December, 1914, or until the further order of this Court;

IT IS FURTHER ORDERED that you and each of you appear before this Court at 10:30 o'clock A. M., on the 21 day of December, 1914, at the Court-room of Division No. —— of the District Court of the United States for the Southern District of California, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, and then and there to show cause, if any you have, why said restraining order, as hereinabove made, should not be made permanent during the pendency of this suit and until the final determination thereof on its merits.

Said placer mining claims above named are described, numbered and named as follows, being situate on Searles Borax Lake, County of San Bernardino, State of California, the location notices of which said placer claims are recorded in Volume 82 of Mining Records, in the office of the County Recorder of the said County of San Bernardino, State of California, at the following respective pages of

said Volume 82 set down opposite and following the hereinafter described, named and numbered placer mining claims: [44]

Dated this 15th day of December, 1914.

BENJAMIN F. BLEDSOE,
Judge.

"The Soda No. 1 Placer Mining Claim," at page 131 thereof;
"The Soda No. 2 Placer Mining Claim," at page 131 thereof;
"The Soda No. 3 Placer Mining Claim," at page 132 thereof;
"The Soda No. 4 Placer Mining Claim," at page 132 thereof;
"The Soda No. 5 Placer Mining Claim," at page 133 thereof;
"The Soda No. 6 Placer Mining Claim," at page 133 thereof;
"The Soda No. 7 Placer Mining Claim," at page 134 thereof;
"The Soda No. 8 Placer Mining Claim," at page 134 thereof;
"The Soda No. 9 Placer Mining Claim," at page 135 thereof;
"The Soda No. 10 Placer Mining Claim," at page 135 thereof;
"The Soda No. 11 Placer Mining Claim," at page 136 thereof;
"The Soda No. 12 Placer Mining Claim," at page 136 thereof;
"The Soda No. 13 Placer Mining Claim," at page 137 thereof;
"The Soda No. 14 Placer Mining Claim," at page 137 thereof;
"The Soda No. 15 Placer Mining Claim," at page 138 thereof;
"The Soda No. 16 Placer Mining Claim," at page 138 thereof;
"The Soda No. 17 Placer Mining Claim," at page 139 thereof;
"The Soda No. 18 Placer Mining Claim," at page 139 thereof;
"The Soda No. 19 Placer Mining Claim," at page 140 thereof;
"The Soda No. 20 Placer Mining Claim," at page 140 thereof;
"The Soda No. 21 Placer Mining Claim," at page 141 thereof;
"The Soda No. 22 Placer Mining Claim," at page 141 thereof;
"The Soda No. 23 Placer Mining Claim," at page 142 thereof;
"The Soda No. 24 Placer Mining Claim," at page 142 thereof;
"The Soda No. 25 Placer Mining Claim," at page 143 thereof;
"The Soda No. 26 Placer Mining Claim," at page 143 thereof;
"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 144 thereof;
"The Soda No. 29 Placer Mining Claim," at page 145 thereof;

"The Soda No. 30 Placer Mining Claim," at page 145 thereof;
"The Soda No. 31 Placer Mining Claim," at page 146 thereof;
"The Soda No. 32 Placer Mining Claim," at page 146 thereof;
"The Soda No. 33 Placer Mining Claim," at page 147 thereof;
"The Soda No. 34 Placer Mining Claim," at page 147 thereof;
"The Soda No. 35 Placer Mining Claim," at page 148 thereof;
"The Soda No. 36 Placer Mining Claim," at page 148 thereof;
"The Soda No. 37 Placer Mining Claim," at page 149 thereof;
"The Soda No. 38 Placer Mining Claim," at page 149 thereof;
"The Soda No. 39 Placer Mining Claim," at page 150 thereof;
"The Soda No. 40 Placer Mining Claim," at page 150 thereof;
"The Soda No. 41 Placer Mining Claim," at page 151 thereof;
"The Soda No. 42 Placer Mining Claim," at page 151 thereof;
"The Soda No. 43 Placer Mining Claim," at page 152 thereof;
"The Soda No. 44 Placer Mining Claim," at page 152 thereof;
"The Soda No. 45 Placer Mining Claim," at page 153 thereof;
"The Soda No. 46 Placer Mining Claim," at page 153 thereof;
"The Soda No. 47 Placer Mining Claim," at page 154 thereof;
"The Soda No. 48 Placer Mining Claim," at page 154 thereof;
"The Soda No. 49 Placer Mining Claim," at page 155 thereof;
"The Soda No. 50 Placer Mining Claim," at page 155 thereof;
"The Soda No. 51 Placer Mining Claim," at page 156 thereof;
"The Soda No. 52 Placer Mining Claim," at page 156 thereof;
"The Soda No. 53 Placer Mining Claim," at page 157 thereof;
"The Soda No. 54 Placer Mining Claim," at page 157 thereof;
"The Soda No. 55 Placer Mining Claim," at page 158 thereof;
"The Soda No. 56 Placer Mining Claim," at page 158 thereof;
"The Soda No. 57 Placer Mining Claim," at page 159 thereof;
"The Soda No. 58 Placer Mining Claim," at page 159 thereof;
"The Soda No. 59 Placer Mining Claim," at page 160 thereof;
"The Soda No. 60 Placer Mining Claim," at page 160 thereof;
"The Soda No. 61 Placer Mining Claim," at page 161 thereof;
"The Soda No. 62 Placer Mining Claim," at page 161 thereof;
"The Soda No. 63 Placer Mining Claim," at page 162 thereof;
[45]
"The Soda No. 64 Placer Mining Claim," at page 162 thereof;

"The Soda No. 65 Placer Mining Claim," at page 163 thereof;
"The Soda No. 66 Placer Mining Claim," at page 163 thereof;
"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 68 Placer Mining Claim," at page 164 thereof;
"The Soda No. 69 Placer Mining Claim," at page 165 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 71 Placer Mining Claim," at page 166 thereof;
"The Soda No. 72 Placer Mining Claim," at page 166 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 74 Placer Mining Claim," at page 167 thereof;
"The Soda No. 75 Placer Mining Claim," at page 168 thereof;
"The Soda No. 76 Placer Mining Claim," at page 168 thereof;
"The Soda No. 77 Placer Mining Claim," at page 169 thereof;
"The Soda No. 78 Placer Mining Claim," at page 169 thereof;
"The Soda No. 79 Placer Mining Claim," at page 170 thereof;
"The Soda No. 80 Placer Mining Claim," at page 170 thereof;
"The Soda No. 81 Placer Mining Claim," at page 171 thereof;
"The Soda No. 82 Placer Mining Claim," at page 171 thereof;
"The Soda No. 83 Placer Mining Claim," at page 172 thereof;
"The Soda No. 84 Placer Mining Claim," at page 172 thereof;
"The Soda No. 85 Placer Mining Claim," at page 173 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 87 Placer Mining Claim," at page 174 thereof;
"The Soda No. 88 Placer Mining Claim," at page 174 thereof;
"The Soda No. 89 Placer Mining Claim," at page 175 thereof;
"The Soda No. 90 Placer Mining Claim," at page 175 thereof;
"The Soda No. 91 Placer Mining Claim," at page 176 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 94 Placer Mining Claim," at page 177 thereof;
"The Soda No. 95 Placer Mining Claim," at page 178 thereof;
"The Soda No. 96 Placer Mining Claim," at page 178 thereof;
"The Soda No. 97 Placer Mining Claim," at page 179 thereof;
"The Soda No. 98 Placer Mining Claim," at page 179 thereof;
"The Soda No. 99 Placer Mining Claim," at page 180 thereof;

"The Soda No. 100 Placer Mining Claim," at page 180 thereof;
"The Soda No. 101 Placer Mining Claim," at page 181 thereof;
"The Soda No. 102 Placer Mining Claim," at page 181 thereof;
"The Soda No. 103 Placer Mining Claim," at page 182 thereof;
"The Soda No. 104 Placer Mining Claim," at page 182 thereof;
"The Soda No. 105 Placer Mining Claim," at page 183 thereof;
"The Soda No. 106 Placer Mining Claim," at page 183 thereof;
"The Soda No. 107 Placer Mining Claim," at page 184 thereof;
"The Soda No. 108 Placer Mining Claim," at page 184 thereof;
"The Soda No. 109 Placer Mining Claim," at page 185 thereof;
"The Soda No. 110 Placer Mining Claim," at page 185 thereof;
"The Soda No. 111 Placer Mining Claim," at page 186 thereof;
"The Soda No. 112 Placer Mining Claim," at page 186 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 115 Placer Mining Claim," at page 188 thereof;
"The Soda No. 116 Placer Mining Claim," at page 188 thereof;
"The Soda No. 117 Placer Mining Claim," at page 189 thereof;
"The Soda No. 118 Placer Mining Claim," at page 189 thereof;
"The Soda No. 119 Placer Mining Claim," at page 190 thereof;
"The Soda No. 120 Placer Mining Claim," at page 190 thereof;
"The Soda No. 121 Placer Mining Claim," at page 191 thereof;
"The Soda No. 122 Placer Mining Claim," at page 191 thereof;
"The Soda No. 123 Placer Mining Claim," at page 192 thereof;
"The Soda No. 124 Placer Mining Claim," at page 192 thereof;
[46]

"The Soda No. 125 Placer Mining Claim," at page 193 thereof;
"The Soda No. 126 Placer Mining Claim," at page 193 thereof;
"The Soda No. 127 Placer Mining Claim," at page 194 thereof;
"The Soda No. 128 Placer Mining Claim," at page 194 thereof;
"The Soda No. 129 Placer Mining Claim," at page 195 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 131 Placer Mining Claim," at page 196 thereof;
"The Soda No. 132 Placer Mining Claim," at page 196 thereof;
"The Soda No. 133 Placer Mining Claim," at page 197 thereof;
"The Soda No. 134 Placer Mining Claim," at page 197 thereof;

"The Soda No. 135 Placer Mining Claim," at page 198 thereof;
"The Soda No. 136 Placer Mining Claim," at page 198 thereof;
"The Soda No. 137 Placer Mining Claim," at page 199 thereof;
"The Soda No. 138 Placer Mining Claim," at page 199 thereof;
"The Soda No. 139 Placer Mining Claim," at page 200 thereof;
"The Soda No. 140 Placer Mining Claim," at page 200 thereof;
"The Soda No. 141 Placer Mining Claim," at page 201 thereof;
"The Soda No. 142 Placer Mining Claim," at page 201 thereof;
"The Soda No. 143 Placer Mining Claim," at page 202 thereof;
"The Soda No. 144 Placer Mining Claim," at page 202 thereof;
"The Soda No. 145 Placer Mining Claim," at page 203 thereof;
"The Soda No. 146 Placer Mining Claim," at page 203 thereof;
"The Soda No. 147 Placer Mining Claim," at page 204 thereof;
"The Soda No. 148 Placer Mining Claim," at page 204 thereof;
"The Soda No. 149 Placer Mining Claim," at page 205 thereof;
"The Soda No. 150 Placer Mining Claim," at page 205 thereof;
"The Soda No. 151 Placer Mining Claim," at page 206 thereof;
"The Soda No. 152 Placer Mining Claim," at page 206 thereof;
"The Soda No. 196 Placer Mining Claim," at page 207 thereof;
"The Soda No. 197 Placer Mining Claim," at page 207 thereof;
"The Soda No. 198 Placer Mining Claim," at page 208 thereof;
"The Soda No. 199 Placer Mining Claim," at page 208 thereof;
"The Soda No. 200 Placer Mining Claim," at page 209 thereof;
"The Soda No. 201 Placer Mining Claim," at page 209 thereof;
"The Soda No. 202 Placer Mining Claim," at page 210 thereof;
"The Soda No. 203 Placer Mining Claim," at page 210 thereof;
"The Soda No. 204 Placer Mining Claim," at page 211 thereof;
"The Soda No. 205 Placer Mining Claim," at page 211 thereof;
"The Soda No. 206 Placer Mining Claim," at page 212 thereof;
"The Soda No. 207 Placer Mining Claim," at page 212 thereof;
"The Soda No. 208 Placer Mining Claim," at page 213 thereof;
"The Soda No. 209 Placer Mining Claim," at page 213 thereof;
"The Soda No. 210 Placer Mining Claim," at page 214 thereof;
"The Soda No. 211 Placer Mining Claim," at page 214 thereof;
"The Soda No. 212 Placer Mining Claim," at page 215 thereof;

"The Soda No. 213 Placer Mining Claim," at page 215 thereof;
"The Soda No. 214 Placer Mining Claim," at page 216 thereof;
"The Soda No. 215 Placer Mining Claim," at page 216 thereof;
"The Soda No. 216 Placer Mining Claim," at page 217 thereof;
"The Soda No. 217 Placer Mining Claim," at page 217 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof;

[Endorsed]: No. B. 58—Eq. U. S. District Court, Southern District California, ... Division. In Equity. Cecil C. Carter vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Restraining Order and Order to Show Cause. Filed Dec. 15, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. [47]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Notice of Motion for Order Vacating and Dissolving Temporary Restraining Order.

To Cecil C. Carter, complainant above named, and to Messrs. H. L. Clayberg and Clayberg & Whitmore, his attorneys:

You and each of you will please take notice, that on Friday, the 18th day of December, 1914, at the

hour of 10:30 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, Southern Division thereof, in the Federal Building, in the city of Los Angeles, county of Los Angeles, State of California, defendants above named will move said Court for an order vacating and dissolving the temporary restraining order heretofore and on the 15th day of December, 1914, issued in the above-entitled action.

Said motion will be made upon the following grounds:

1. That the allegations of the complainant's bill on file in the above-entitled cause, taken in connection with the allegations contained in the affidavits hereinafter mentioned and served herewith show that complainant is not entitled to said temporary restraining order.

2. That the above-entitled cause does not present a case [48] for the issuance of said temporary restraining order.

3. That defendants, and each of them, will be irreparably injured if said order is not vacated and dissolved.

4. That said order does not provide for any security for defendants' costs and damages and it appears from the affidavits served herewith that complainant is financially irresponsible.

Said motion will be made upon the affidavits of Joseph K. Hutchinson, Stella Schuler and Thomas W. Pack, the defendants above named, served and filed herewith, and upon all the records, papers, proceedings and files in the above-entitled action, and

upon this Notice of Motion and upon oral testimony to be adduced at the hearing of said motion.

Dated Los Angeles, Cal., December 15, 1914.

JOSEPH K. HUTCHINSON,

Attorney for Defendants and in *Propria Persona.*

[Endorsed]: No. B. 58—Equity. United States District Court, Southern District of California (Original) Cecil C. Carter, Complainant, vs. Thos. W. Pack, Stella Schuler and Joseph K. Hutchinson, Defendants. Notice of Motion for Order Vacating and Dissolving Temporary Restraining Order. Filed Dec. 16, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pursuant to Rule 49, E. L. Ball, Attorney at Law, 737 Consolidated Realty Bldg., Los Angeles, Cal., is hereby designated as the person on whom to serve papers in this cause. Joseph K. Hutchinson, Attorney for Defendants, San Francisco, Calif. [49]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and JOSEPH K. HUTCHINSON,

Defendants.

Affidavit of Defendant Joseph K. Hutchinson on Motion to Dissolve Temporary Restraining Order.

State of California,
County of Los Angeles,—ss.

JOSEPH K. HUTCHINSON, being first duly sworn, deposes and says:

That he is, and at all the times herein mentioned, was a white male citizen of the United States, and a resident and citizen of the state of California, over the age of twenty-one years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint and inseparable from the like interests of the other two defendants in said cause; that affiant makes this affidavit for and on behalf of each and all of the said defendants above named, including affiant;

That affiant has read the Bill of Complaint on file in said cause, and knows the contents thereof, and each and every allegation therein contained;

That the P. Perkins referred to in complainant's bill on file herein as being one of the original locators of said placer mining claim, and as being one of complainant's predecessors in interest, died at the city of Colorado Springs, county of El Paso, state of Colorado, in the early part of the year 1914; that thereafter and [50] in the said early part of said year of 1914, one George M. Irwin was, upon his petition made to the District Court of the state of Colorado, in and for the said county of El Paso, in

this behalf, duly appointed administrator of the estate of the said P. Perkins, and letters of administration were thereupon issued to the said George M. Irwin; that the said George M. Irwin has thence, hitherto continued to be and still is the duly appointed, qualified and acting administrator of the said estate of the said P. Perkins, deceased; that in the month of November, 1914, the said Irwin, as the said administrator, wrote to affiant offering, as said administrator, to sell to affiant, all of the right, title and interest of the said estate of the said P. Perkins, deceased, in and to the said placer mining claims; that affiant thereupon and in the said month of November, 1914, accepted said offer; that affiant thereupon and with the consent of the said Irwin, as the said administrator, commenced proceedings for the appointment of an administrator of the said estate of the said P. Perkins, deceased, in the Superior Court of the State of California, in and for the County of San Bernardino; that the purpose of the said proceedings was to obtain a proper order from the said Superior Court of the State of California, in and for the said County of San Bernardino, permitting and directing the said administrator of the said estate of the said P. Perkins, deceased, to sell to affiant, or otherwise as the said court, might direct, the said one-eighth interest of the said Perkins' estate in the said placer mining claims; that thereafter and upon the said proceedings so commenced in the said Superior Court of the State of California, in and for the County of San Bernardino, the public administrator of said county of San Bernardino, was

appointed by the said Superior Court as administrator of the said estate of the said P. Perkins, deceased, and letters of administration upon the said estate issued to the said public administrator; that the said public [51] administrator of the said county of San Bernardino thence hitherto has continued to be and still is the duly appointed, qualified and acting administrator, in the state of California, of the estate of the said P. Perkins, deceased; that the said interest of the said P. Perkins in and to said placer mining claims is the only property within the state of California belonging to the estate of said deceased; that it is the intention of affiant to, if the same be possible and legal, through the said Superior Court of the state of California, in and for the said county of San Bernardino, and by its orders and under its direction, to purchase from the said estate of said P. Perkins the said interest in the said placer mining claims, and thus to consummate the agreement heretofore referred to as having been entered into in November, 1914, between affiant and the said Irwin, as the said administrator in the state of Colorado, of the said estate of the said Perkins, deceased;

That on Monday the 14th day of December, 1914, affiant for the first time ascertained the contents of the Bill of Complaint on file herein, and more particularly the allegations therein contained in reference to the conveyance alleged therein to have been made from the said P. Perkins and Sylvia Perkins, his wife, to one F. Kimball, on or about, to wit, the 10th day of June, 1912; that because of the hereinabove referred to correspondence that affiant had had

with the said Irwin, affiant thereupon and on, to wit, said 14th day of December, 1914, sent to the said Irwin by telegraph from the city of Los Angeles, county of Los Angeles, state of California, to the said Irwin, at the city of Colorado Springs, county of El Paso, state of Colorado, a telegram in the words and figures following: [52]

"December 14, 1914.

"Geo. M. Irwin,
Attorney at Law,
Colorado Springs, Colo.

Lee has filed petition for injunction in United States District Court, Southern District of California stop petition asks restraining order enjoining me from going further with forfeiture proceedings of which service of notice on you last September was part stop although complainant is one Carter citizen of Oregon petition is verified by Lee stop he alleges that on June tenth nineteen twelve Perkins and Sylvia Perkins his wife made executed and delivered a deed covering the undivided one-eighth interest concerning which you and I have corresponded and which you have agreed on behalf of Perkins estate to sell to me stop Lee alleges that said deed runs to one F. Kimball as grantee stop Kimball recorded deed November thirtieth this year stop then transferred to present complainant stop in view of *mt* correspondence and agreement with you as administrator of Perkins estate I do not understand Lee's allegations unless deed he has recorded is a forgery or is void for want of consideration or because not legally delivered stop I want to be fully informed

in order to oppose granting of injunction stop I shall therefore be much indebted to you if you will telegraph me immediately and in detail my expense Hotel Alexandria Los Angeles any facts which you know which will clear up present strange situation stop My answer to yours of third instant in mail.

(Signed) JOSEPH K. HUTCHINSON."

That thereafter on, to wit, said 14th day of December, 1914, affiant received from the said Irwin in reply to the said telegram hereinabove set forth, a telegram in the words and figures following:

"Colorado Springs, Colo., Dec. 14, 1914.

Mr. Joseph K. Hutchinson,

Hotel Alexandria, Los Angeles.

Mrs. Perkins has no recollection of having made deed to Kimball altho she is not sure about it if *so* deed was delivered to Lee for purpose of consluding sale of property and was without consideration. It appears that Lee used Perkins name as one of the locators and he may have secured deed as now appears.

(Signed) GEO. M. IRWIN."

That thereafter and on, to wit, the said 14th day of December, 1914, and upon the receipt of the said telegram from the said Irwin, affiant again telegraphed to the said Irwin as follows: [53]

"Dec. 14, 1914.

To Geo. M. Irwin, Atty. at Law,

Colorado Springs, Colo.

If I assert in federal court here that deed was without consideration will proof to support my assertion

be available in Colorado Springs.

(Signed) JOSEPH K. HUTCHINSON."

Thereafter and on the 15th day of December, 1914, affiant received from the said Irwin in reply to the second telegram of the said affiant to the said Irwin, a telegram in the words and figures following:

"Colorado Springs, Colo., Dec. 15, 1914.

Mr. Joseph K. Hutchinson,

Hotel Alexandria, Los Angeles, Cal.

Mrs. Perkins would testify that there was no consideration for Kimball deed if there is such deed please advise name notary before whom deed recorded appears to have been acknowledged and whether in El Paso county Colorado also date acknowledgment.

(Signed) GEORGE M. IRWIN."

That because of the information received by affiant from the said Irwin as hereinabove set forth in the said telegrams, affiant is informed, and believes, and therefore alleges the fact to be that the said deed referred to in the Bill of Complaint on file herein, as running from the said P. Perkins and Sylvia Perkins, his wife, to the said F. Kimball, was never delivered to the grantee named therein nor was there any consideration whatsoever therefor;

That the said F. Kimball referred to in the said Bill of Complaint as being the grantee named in the said deed is, and at all times herein mentioned, a resident and citizen of the state of California, and a resident of the city of Oakland, County of Alameda, in said state; that the said Lee, who verified the Bill of Complaint on file herein, and the said

Kimball, have known each other for several years; that the said Kimball [54] does not know nor has he ever known the said P. Perkins and the said Sylvia Perkins, or either of them;

That heretofore, and on or about, to wit: the 14th day of January, 1914, S. Schuler, one of the defendants above named, made, executed, acknowledged and delivered to affiant her certain grant, bargain and sale deed conveying to affiant all the right, title and interest, to wit, an undivided one-eighth interest, of the said defendant Schuler in and to the 175 placer mining claims referred to in the said Bill of Complaint on file herein, said 175 placer mining claims being situate in and upon Searles Borax Lake in the county of San Bernardino, State of California; that thereafter and in said month of January, 1914, said deed was duly recorded in the office of the County Recorder of said county of San Bernardino; that at the time the said defendant Schuler conveyed her said interest in said placer mining claims to affiant the said interest so conveyed stood upon the records of the County Recorder in and for the said county of San Bernardino in the name of the said defendant Schuler and had so stood in her name for more than one year prior to the date of said transfer; that affiant knew at the time of the said conveyance by the said Schuler to him, and had known for a long time prior thereto, that the said interest of the said Schuler so stood upon the records of the County Recorder of the County of San Bernardino, in the name of said Schuler, without any cloud upon or encumbrance against said interest appearing upon the face

of the said records; that affiant relied upon his said knowledge of said records in purchasing said interest from said Schuler, and, pursuant thereto, in taking said deed and conveyance; that at the time of the said conveyance by the said Schuler to affiant, affiant had no knowledge, notice or belief of whatsoever kind or nature of the existence of any claims, rights or equities of whatsoever kind or nature against or related to in any way whatsoever the said interest of the said [55] Schuler, and owned, held or claimed by persons other than the said Schuler; that at the time of the said conveyance by the said Schuler to affiant, affiant did not know nor did he have any knowledge, notice or belief of whatsoever kind or nature, of the existence of the deed and conveyance referred to in the Bill of Complaint on file herein from the said Schuler as grantor to one J. A. Shellito as grantee, whereby the said Schuler transferred and conveyed to the said Shellito all of her right, title and interest in and to said placer mining claims, nor did affiant have any knowledge, notice or belief of any kind or nature whatsoever as to the fact, referred to in the said Bill of Complaint, that the said Schuler had on the 25th day of December, 1913, or at any other time, made, executed, acknowledged and delivered her deed and conveyance to the said Shellito, or had made, executed, acknowledgd, and delivered any other deed, or made any other transfer to any other person whomsoever; that affiant took said conveyance from said Schuler as an innocent purchaser and wholly without notice of already existing rights, claims or equities against the interest so con-

veyed by Schuler to affiant, belonging to said Shellito or anyone whomsoever; affiant denies that, at the time of receiving said conveyance, or at any other time, or at all, he was fully, or at all, informed and had full, or any other, knowledge, or was fully, or at all, informed, or had full, or any other knowledge, that the said Schuler had conveyed all, or any portion of, her rights, interests, claims and property, or all, or any of, her rights, or interests, or claims, or property, in said conveyance described to the said J. A. Shellito, or any other person whomsover, a long time prior to the execution of said conveyance by said Schuler to affiant, or at any other time, or at all;

That for and in consideration of the said conveyance by said Schuler to affiant, and at the time of said conveyance, and as a [56] part thereof, affiant paid to said Schuler, and said Schuler received and accepted from affiant a certain sum of money in cash; that affiant made and completed said purchase from said Schuler of her said interest, in good faith, and without intention to, by the said purchase, defraud or injure anyone whomsoever;

Affiant denies that he took said conveyance from said Schuler in pursuance of a combination and conspiracy, or a combination, or conspiracy, by and between, or by, or between, the defendants in the above-entitled cause, or any of them, and the Foreign Mines & Decelopment Company, the American Trona Company, and the California Trona Company, or the Foreign Mines & Development, or the American Trona Company, or the California Trona Company, wherein and whereby, or wherein, or whereby, the

defendants above named, or any of them, and the said corporations, or any of the said corporations, confederated and combined, or confederated, or combined, together to injure complainant herein, or his predecessors in interest, or either, or any of them, and to deprive and defraud him, or them, or any, or either of them, or deprive, or defraud him, or them, or any, or either of them, or to injure complainant or his predecessors in interest, or either or any of them, or defraud him, or them, or either, or any of them, of all, or any portion of, his, or their, or any of their, right title and interest, or all, or any portion of, his, or their, or any of their, right, or title, or interest in and to, or in or to said placer mining claims;

Affiant denies that the said conveyance by the said Schuler to affiant was made and done or was made, or done, pursuant to and in order to carry out a combination and conspiracy, or a combination, or conspiracy, or pursuant to, or in order to carry out a combination and conspiracy, or a combination, or conspiracy, to injure complainant, or his predecessors in interest, or either, or any of them, and to deprive and defraud him, or them, or either, or any of them, or deprive, or defraud [57] him, or them, or either, or any of them, or to injure complainant, or his predecessors in interest, or any of them, or to deprive, or defraud him, or them, or either, or any of them, of all, or any portion of, his, or their, or any of their, right, title and interest, or all, or any portion of, his, or their, or any of their right, or title, or interest, in and to, or in, or to, said placer mining claims, and each and all of them, or said placer min-

ing claims, or each, or all of them; affiant denies that said conveyance by said Schuler to affiant was made and done, or was made, or done, wholly and totally, or wholly, or totally, without a valuable or other consideration.

Affiant denies that the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company have, or that the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona, has, fraudulently, or in any other manner, attempted to procure the right, title and interest of Pack, one of the defendants above named, or the right, or title, or interest of the said Pack, in and to said placer locations, or in, or to, said placer locations for the said or any other purpose, or using the said interest of the said Pack in and to said locations, or in, or to, said locations, in *w*uch a way and manner, or in such a way, or manner as to destroy all, or any portion of, the complainant's rights and interest, or those of his predecessors in interest, or any, or either of them, or the rights, or interest, of complainant, or his predecessors in interest, or either, or any of them, or any part thereof, or of both or either thereof, therein, and to defraud complainant, or his predecessors in interest, or either, or any of them, out of all, or any portion of, interest in and to, or in, or to, said claims, and each of them, or any of them, or to said claims, or each of them, or any of them, or in such a way, or manner, as to destroy all, or any portion of complainant's rights and interest, or those [58] of his predecessors in

interest, or either, or any of them, or rights, or interest, or any part or portion thereof, or of either of both thereof, therein, or to defraud complainant, or his predecessors in interest, or either, or any of them, out of all, or any portion of, interest in and to, or in, or to, said claims, or any of them; affiant denies that he has been acting as the agent, representative and attorney, or as agent, or as the representative or attorney, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or of the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, in endeavoring to deprive and defraud, or to deprive, or defraud, complainant, or his predecessors in interest, or either, or any of them, of their rights and title, or rights, or title, or any part or portion thereof, or either or both thereof, in and to, or in, or to, said placer mining locations; affiant denies that, under the direction and orders, or under the direction, or orders, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, fraudulently, or in any other manner, he obtained said transfer of the said one-eighth interest in and to, or in, or to, said placer mining claims, from said Schuler, in pursuance to a combination and conspiracy, or in pursuance to a combination, or conspiracy entered into and carried on, or entered into, or carried on, by and between, or by,

or between, said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the said defendants herein, or any of them, or by and between, or by, or between, said Foreign Mines & Development Company, American Tr*aon* Company, and the California Trona Company, [59] or said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, of any of them, or the said defendants herein, or any of them, to injure complainant, or his predecessors in interest, or either, or any of them, and defraud and deprive him, or them, or either, or any of them, or to injure complainant, or his predecessors in interest, or either, or any of them, or defraud him, or them, or any, or either of them, of all, or any portion, of his, or their, or any of their, right, title and interest, or all, or any portion, of, his, or their, or any of their, right, or title, or interest, in and to, or in, or to, said claims, and each of them, or in and to, or in, or to, said claims, or each of them, or that he obtained the said transfer of the said one-eighth interest in and to, or in, or to, said placer mining claims, in pursuance of any combination and conspiracy whatsoever, or in pursuance of any conspiracy whatsoever;

Affiant denies that in further pursuance of said, or any other combination and conspiracy, or said, or any other, combination, or conspiracy, and under the orders and direction, or under the orders, or direc-

tion, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or that in further pursuance of said, or any other, combination and conspiracy, or said, or any other combination, or conspiracy, or under the orders and directions, or under the orders, or directions, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, affiant and his codefendants, or any of them, caused to be served upon the administrator of the estate of complainant's predecessor in interest, to wit, P. Perkins, notice of forfeiture referred to in [60] the Bill of Complaint on file herein; affiant denies that the said transfer of the said one-eighth interest in and to, or in, or to, said claims by the said Schuler to affiant, and the serving of said notice of forfeiture upon the same, or the said transfer of the said one-eighth interest in and to, or in, or to, said claims, by the said Schuler to affiant, or the serving of the said notice of forfeiture upon the said administrator, was all done, or that any part thereof was done, in pursuance to and in the carrying out of, or in pursuance to, or in the carrying out of, a combination and conspiracy, or a conspiracy, entered into by and between, or by, or between, the said Foreign Mines & Development Company, the

American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the defendants above named, or any of them, or by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the defendants above named, or any of them; affiant denies that the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, and the defendants above named, or the defendants above named, or any of them, confederated together, for the purpose of injuring the complainant, or his predecessors in interest, or either, or any of them, and depriving and defrauding him, or them, or either or any of them, of, or for the purpose of injuring complainant, or his predecessors in interest, or either, or any of them, or defrauding him, or them, or either, or any of them, of, all, or any portion of his, or their, or any of their, rights, [61] title and interest, or all, or any portion of, his, or their, or any of their, right, or title, or interest, in and to, or in, or to, said placer mining claims;

Affiant denies that the notice of forfeiture was

prepared and served upon said administrator, or was prepared, or served, upon said administrator, pursuant to and in the furtherance of, or pursuant to, or in the furtherance of, such, or any, other combination and conspiracy, or of such, or any other, conspiracy, between the defendants above named, or any of them, and the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or between the defendants above named, or any of them, and the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or all or any of them; affiant denies that neither said Pack, defendant above named, nor any of the defendants above named, or their alleged co-conspirators, are entitled to any contribution from complainant in any sum or amount whatsoever;

And further answering said Bill of Complaint, affiant alleges the complainant has a plain, speedy and adequate remedy at law in the premises by way of payment of complainant's portion of the sum so expended for the performance of assessment work for the year 1911, and the demanding, procurement and recordation of a receipt for such payment as provided by section 1426–0 of the Civil Code of the State of California, and the recordation of such a receipt as effectually removes any cloud arising from the recordation of the affidavit of service of Exhibit "A" as any decree of this court or any other court can or

will; and that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said proportion of said sums in that affiant loses entirely the benefit and effect of his said Notice of [62] Forfeiture through failure to record an affidavit of the service of the same within ninety (90) days after said service, as required by said Section 1426o of the Civil Code of the State of California, affiant being restrained from recording said affidavit of service by order of the above-entitled court.

Affiant denies that while the predecessors of complainant, and the co-locators of said predecessors, or any of them, were engaged in the performance of the annual representation upon said 175 placer claims, or any of them, for the year 1912, or for any other year, they were forcibly prevented or at all prevented, or that any of them were forcibly, or in any other manner, prevented from completing said annual representation upon the whole, or upon any portion of, said 175 placer claims by the Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or by any of them, or by each and all, or by each, or by all, said corporations, or any of them, or by their, or any of their, or each of their, agents, employees, representatives, servants or attorneys; denies that the employees of the predecessors in interest of this plaintiff, or any of them, and the co-locators of the said predecessors in interest, or any of them, or the persons representing the predecessor in interest of plaintiff, and the persons representing the predecessors in interest of plaintiff, or his co-locators, and

his co-locators, or any of them, in doing said, or any other, annual, representation upon said 175 placer claims for the year 1912, were forcibly ejected, or otherwise ejected, and driven from, or forcibly, or otherwise, ejected, or driven from, said placer claims by the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or any of them, or by each, or all of them, or by their, or each of their, agents, representatives, employees, servants or attorneys, or by anyone else whomsoever, or otherwise, or at all, and/or threatened with great or any [63] other physical or any other *violcent*, or injury, or otherwise threatened, in case they, or any of them, return to said placer claims, or any of them, or attempted to place upon said claims, or any of them, any labor or improvements in the annual representation thereof for the year 1912.

JOSEPH K. HUTCHINSON.

Subscribed and sworn to before me this 16 day of December, 1014.

[Seal] ELMER L. KINCAID,
Notary Public in and for the County of Los Angeles, State of California. [64]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and JOSEPH K. HUTCHINSON,

Defendants.

Affidavit of S. Schuler on Motion to Dissolve Temporary Restraining Order.

State of California,
County of Los Angeles,—ss.

S. SCHULER, being duly sworn, deposes and says: That she is, and at all times herein mentioned was, a white female citizen of the United States, and a resident and citizen of the state of California, over the age of 21 years, and one of the defendants in the above-entitled cause; that the interests of the said affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in this said cause; that affiant makes this affidavit for and on behalf of each and all of the said defendants above named, including affiant;

That affiant has read the Bill of Complaint on file in said cause and knows the contents thereof, and each and every allegation therein contained.

Affiant denies that, on or about the 25th day of December, 1913, or at any other time, or at all, she made,

executed, acknowledged and delivered her deed of conveyance, to one, J. A. Shellito, whereby she transfered and conveyed, or whereby she transfered, or conveyed, to said Shellito, or to anyone else, whomsoever, all, or any portion of her rights, title and interest, or all, or a portion of, her rights, or title, or **[65]** interest, in and to, or in, or to, said placer mining claims, or that she delivered any deed and conveyance, or deed, or conveyance, to said Shellito, or to anyone else whomsoever;

Affiant alleges that on or about, to wit, the 25th day of December, 1913, affiant made, signed and acknowledged, a deed of conveyance from herself as grantor to one J. A. Shellito as grantee; that said deed covered and would have conveyed, had the same been delivered, all of affiant's right, title and interest in and to said placer mining claims; that said deed was so executed by affiant to be placed in escrow, and not to be delivered to the grantee named therein, until certain conditions to be performed by the said grantee, for and on behalf of affiant, had been fully performed; that many of such conditions were impossible of fulfillment and performance within a period of many months after the date of said deed; that other of the said conditions were to be performed and fulfilled by the said Shellito in favor and on behalf of affiant immediately upon the signing and acknowledgment of said deed; that in and by the terms of said escrow, said deed was to be placed by affiant in the hands of the Security Trust & Savings Bank a corporation, situate in the city of Los Angeles, county of Los Angeles, state of California, to

be by it held as escrow holder, and to be by it delivered to said Shellito, upon the fulfillment and performance of all of the said conditions; that immediately upon the making, signing and acknowledgment of said deed, affiant at the city and county of San Francisco, state of California, handed the said deed to one Henry E. Lee, the person who verified the Bill of Complaint on file herein, upon his promise made to affiant to take the same from the said city and county of San Francisco to the said city of Los Angeles and there to place the said deed in escrow with said Security Trust & Savings Bank;

That affiant is informed and believes, therefore alleges [66] the fact to be, that the said Lee did not keep said promise so made to affiant, and that he did not place, nor has he ever placed, said deed, in escrow with said Security Trust & Savings Bank or elsewhere, pursuant to the terms of said promise made to affiant as aforesaid, or otherwise, or at all;

That none of the conditions which were conditions precedent to the delivery by the said Security Trust & Savings Bank, as escrow holder of said deed for affiant, has ever been fulfilled or performed by the said Shellito, or by any other person whomsoever; that said Lee has never returned said deed to affiant; that affiant does not know where the said deed now is; nor has she known since the date upon which she handed the same to the said Lee, where the said deed, or in whose possession it has been; that someone, of whose identity affiant has not personal knowledge, wholly without affiant's consent or knowledge or authority, recorded, said deed, in the

month of March or April, 1914, in the office of the county recorder of the County of San Bernardino, State of California;

That affiant is informed and believes, and therefore alleges the person who so recorded said deed in the said office of the said county recorder of the said county of San Bernardino, was the said Henry E. Lee;

That affiant has never had any communication whatsoever with or from the said Shellito, by way of complaint, or otherwise, or at all; that the only transaction which the said affiant has ever had with the said Shellito in any way whatsoever was as hereinabove set forth, to wit, the making, signing and acknowledgment of the said deed;

That affiant is informed and believes and therefore alleges the fact to be, that the said Shellito does not now nor has he for many months past, intended or desired to carry out to fulfillment and completion the said transaction, by the performance [67] hereinabove referred to of the said conditions precedent to the delivery by the said, or any other, escrow holder of the said deed;

That thereafter, and on or about, to wit: 14th day of January, 1914, affiant made, executed, acknowledged and delivered to Joseph K. Hutchinson, one of the defendants above named, her certain grant, bargain and sale deed, conveying to the said Hutchinson all the rights, title and interest, to wit: an undivided one-eighth interest of affiant, in and to the said 175 placer mining claims referred to in the Bill of Complaint on file herein, all of which said placer mining

claims are situate in and upon Searles Borax Lake, in the county of San Bernardino, state of California; that at the time affiant conveyed her said interest in said placer mining claims to said Hutchinson, the said interest so conveyed stood upon the records of the county recorder in and for the said county of San Bernardino, in the name of affiant, and had so stood in her name for more than one year prior to the date of said transfer, without any cloud upon, or incumbrance against, said interest, appearing upon the face of said records;

That prior to the said execution of the said deed to said Hutchinson, and after the said making, signing and acknowledgement of the said deed to the said Shellito, affiant stated all of the facts of the case to her attorney, one Ezra W. Decoto, deputy District Attorney of the county of Alameda, state of California, and thereupon and after such statement of all of the facts of the case by affiant to the said Decoto, the said Decoto advised affiant that she could legally, and without liability, or without breach of any duty owed to the said Shellito, or to anyone else, make, execute, acknowledge and deliver the said deed to the said Hutchinson; that thereafter and in the presence of the said Decoto, and acting upon his said advice, the said Schuler, affiant herein, made, executed, acknowledged and delivered the said deed to the said Hutchinson; That thereafter, and in the said month of January, 1914, the said deed was recorded by the said Hutchinson [68] in the office of the county recorder of the county of San Bernardino, state of California;

That at no time prior to the execution and delivery of said deed did the affiant tell said Hutchinson, nor did her said attorney tell said Hutchinson, nor did either affiant or her said attorney in any way whatsoever notify the said Hutchinson that affiant had made, signed and acknowledged said deed to said Shellito, prior thereto, and on or about, to wit: the said 25th day of December, 1913, or at any other time, or at all;

That for and in consideration of the said conveyance by affiant to the said Hutchinson, and at the time of the said conveyance, and as a part thereof, the said Hutchinson, paid to affiant, and affiant received and accepted from said Hutchinson, a certain sum of money in cash; that affiant made and completed said sale to said Hutchinson of her said interest, in good faith, and without any intention to, by the said sale, defraud or injure any one whomsoever;

Affiant denies that she made such conveyance to said Hutchinson in pursuance of a combination and conspiracy, or conspiracy, by and between, or by, or between, the defendants in the above-entitled cause, or any of them, and the Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or the Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, wherein and whereby, or wherein or whereby, the defendants above named, or any of them, and the said corporations, or any of the said corporations, confederated and combined or confederated, or combined together,

to injure the complainant herein, or his predecessors in interest, or either, or any of them, and to deprive and defraud him, or them, or either, or any of them, or to injure the complainant herein, or his predecessors in interest, or either [69] or any of them, or defraud him, or them, or either or any of them, of all, or any portion of, his or their right, title and interest, or all or any portion of, his or their right, or title, or interest in and to, or in or to, said placer mining claims, and each and all of them, or said placer mining claims, or each, or all of them; affiant denies that said conveyance by affiant to the said Hutchinson was made and done, or was made, or done, wholly and totally, or wholly, or totally, without a valuable or other consideration;

Affiant denies that in pursuance of said, or any other, combination and conspiracy, or said, or any other, conspiracy, and under the orders and directions, or under the orders, or directions, of the Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or the said Foreign Mines & Company, or the American Trona Company, or the California Trona Company, or any of them, or that in pursuance of said, or any other, combination and conspiracy, or said, or any other conspiracy, or under the orders and direction, or under the orders, or direction, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, affiant

and her co-defendants, or any of them, caused to be served upon the administrator of the estate of the predecessor in interest of complainant herein, to wit: said P. Perkins, the notice of forfeiture referred to in the Bill of Complaint on file herein; affiant denies that the said transfer of the said interest in and to, or in, or to, said claims by affiant to the said Hutchinson, and the serving of said notice of forfeiture, upon the said administrator, or the said transfer of the said interest in and to or in, or to, the said claims by affiant to the said Hutchinson, or the serving of the said notice of forfeiture upon the said [70] administrator, was all done, or that any part thereof was done, in pursuance to and in the carrying out of, or in pursuance to, or in the carrying out of, the combination and conspiracy, or a conspiracy, entered into by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between the said Foreign Mines & Development Company, or the American Trona Company; or the California Trona Company, or any of them, and the defendants above named, or any of them, or by and between, or by or between, the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona

Company, or the California Trona Company, or any of them, or the defendants above named, or any of them; affiant denies that the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, and the defendants above named, or the defendants above named, or any of them, confederated together, for the purpose of injuring the complainant herein, or his predecessors in interest, or either, or any of them, and depriving and defrauding him, or them, or either or any of them, of, or for the purpose of injuring complainant herein, or his predecessors in interest, or either, or any of them, or defrauding him, or them, or either, or any of them, of, all, or any portion of, his or their right, title and interest, or all, or any portion of, his or their right, or title, or interest, in and to, or in, or to, said placer mining claims;

Affiant denies that the said notice of forfeiture was [71] prepared and served upon said administrator, or was prepared or served upon said administrator herein, pursuant to and in the furtherance of, or pursuant to, or in the furtherance of, such or any other, combination and conspiracy, or of such, or any other conspiracy between the defendants above named, or any of them, and the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or between the defendants above named, or any of them, and the said Foreign Mines & Development Company, or

the American Trona Company, or the California Trona Company, or any of them, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or all of them;

Affiant denies that neither said Pack, one of the defendants in the above named, nor any of the defendants above named, or the alleged co-conspirators, or any of them, are entitled to any contribution from complainant in any sum or amount whatsoever;

And further answering the said Bill of Complaint on file herein, affiant alleges that complainant has a plain, speedy and adequate remedy at law, in the premises, by way of payment of plaintiff's proportions of the sum so expended for the performance of assessment work for the years of 1911 and 1912 and the demanding, procurement and recordation of a receipt for such payment, as is provided by section 1426o of the civil code of the State of California; that the recordation of such receipt removes as effectually any cloud which the recordation of the affidavit of service of the notice of forfeiture might constitute, as any decree of this court or any other court can or will; that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said portion of said sums, in that complainant is a non-resident of the state of California, as appears from the Bill of Complaint on file herein, and in that affiant loses entirely the benefit and effect of her said **[72]** notice of forfeiture through failure to record an affidavit of service within 90 days after

the said service, affiant being restrained from so doing by order of this Honorable Court.

S. SCHULER.

Subscribed and sworn to before me this 16th day of December, 1914.

[Seal] ELMER L. KINCAID,
Notary Public in and for Los Angeles, County, State of California [73]

In the District Court of the United States, Southern District of California.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Affidavit of Defendant Thomas W. Pack, on Motion to Dissolve Temporary Restraining Order.

State of California,
County of Los Angeles,—ss.

Thomas W. Pack, being duly sworn deposes and says: That he is and at the times herein mentioned was, a white male citizen of the United States and a resident and citizen of the State of California, over the age of twenty-one years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause; that affiant makes

this affidavit on motion to dissolve the temporary Restraining Order heretofore given, made and entered by the above-entitled Court in said cause, for and on behalf of each and all of the said defendants, including affiant;

That affiant has read the Bill of Complaint on file in said cause and knows the contents thereof and each and every allegation therein contained; that all of the facts set forth and attempted to be set forth in said Bill of Complaint are within the personal knowledge of affiant;

That in the year 1910 affiant personally paid out and [74] expended of his own moneys all of the expenses and costs and every expense and cost of locating and recording in the names of E. Thompson, H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins, the alleged predecessor in interest of complainant, D. Smith, and affiant, as set forth in the Bill of Complaint on file herein, the placer mining claims described in said bill, reference to which is hereby made for a more complete description thereof; that said E. Thompson, H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins and D. Smith did not contribute to pay to affiant, nor have they ever contributed or paid to affiant, nor did any of them contribute to pay to affiant nor have any of them ever contributed or paid to affiant, said money so paid out and expended by affiant for said expenses and costs, or any part or portion thereof;

Affiant alleges and affirms that he did pay out and expend of his own moneys during the years 1911 and 1912 the sum of $5600, in connection with and for

the purpose of procuring the performance of the annual labor upon the 175 placer mining claims hereinbefore referred to and more fully described in the Bill of Complaint on file herein, which said sum affiant believes should be properly charged against and constitute a part of the value of, the annual assessment work for the years 1911 and 1912 and which said sum affiant believes should be repaid and contributed to him by his colocators and their or any of their successors in interest and that complainant herein, as the successor in interest of said P. Perkins should reimburse affiant for one-eighth of said sum; that the co-owners of affiant and their successors in interest in the said hereinabove referred to placer mining claims, including complainant, have not contributed or paid to affiant, nor have any of them contributed or paid to affiant, at any time or at all, any part or portion whatsoever of said sum of $5600 to affiant, except as in the Bill of Complaint set forth; [75] affiant denies that complainant or his predecessor in interest, or any of his colocators or co-owners, expended any money for or performed any representation work in or for the years 1911 and 1912 on said 175 placer mining claims or any thereof heretofore referred to, or that any representation work was done on said 175 claims, or any of them, other than the work done by affiant as hereinabove set out;

Affiant alleges that said sum of $5600 was the only moneys expended by any of the locators, or owners of said placer mining claims for the purpose of complying, for the said years of 1911 and 1912 with the

requirements of section 2324 of the Revised Statutes of the United States and the amendments thereof, and that no other sums whatsoever have been expended by anyone whomsoever, for the purpose of complying with said section 2324 for the said years of 1911 and 1912 with reference to said 175 placer mining claims;

Affiant denies that he has ever conspired and combined, or conspired, or combined, with the other defendants in this suit and with the Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or with any of them, to injure complainant or complainant's predecessor in interest, or either of them, and to deprive and defraud, or to deprive, or to defraud, complainant and complainant's predecessors in interest or any of them, of all, or any, of the right, title and interest, or right, or title, or interest of complainant and his predecessors in interest, or any of them, in and to, or in, or to, the placer mining claims described in said Bill of Complaint, affiant denies that he caused the notice of Forfeiture, Exibit "A," to be served upon the administrator of complainant's predecessor in interest, P. Perkins, in pursuance of a, or any combination, and conspiracy, or of a, or any, combination or conspiracy, and under the orders and directions, or under the orders, or under the [76] directions of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or any of them;

Affiant denies that the sum of $750 or any part of

said sum sued for in the action of "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, Defendants," and numbered 46604 in the records of the Superior Court of the State of California, in and for the city and county of San Francisco, referred to in the Bill of Complaint on file herein, constitues part of the amount which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the years 1911 and 1912 for doing the assessment work on the said 175 placer mining claims; affiant alleges that neither said sum of $750, nor any part of said sum, constitutes a part or portion of the said sum of $5600 referred to in said Notice of Forfeiture and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of $3645, or any part of said sum, sued for in the action of "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, Defendants," and numbered 46692, in the records of the Superior Court of the State of California, in and for the city and county of San Francisco, referred to in the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the Bill of Complaint, to have been paid for by affiant in the years 1911 and

1912 for doing the assessment work on said 175 placer mining claims; affiant alleges that neither said sum of $3645, nor any part thereof, constitutes **[77]** a part or portion of the said sum of $5600 referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of $750, or any part of said sum sued for in the action of "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, and S. Schuler, a Copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,723 in the files and records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to in said Bill of Complaint, to have been paid by affiant in the years 1911 and 1912 for doing the assessment work on the said 175 placer mining claims; affiant alleges that neither said sum of $750 or any part of said sum, constitutes a portion of the said sum of $5,600 referred to in said notice of forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of $3,670, or any part of said sum, sued for in the action of "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Way-

mire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnershrip, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,724 in the files and records of the Superior Court of the State of California in and for the City and County of San Francisco, referred to in the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been [78] paid by affiant in the years 1911 and 1912 for doing the assessment work on the said 175 placer mining claims; affiant alleges that neither said sum of $3,670 or any part thereof, constitutes a part or portion of the said sum of $5,600 referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of $1443.50, or any part of said sum, sued for in the action of "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a Copartnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an Association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Doe, Richard Roe and Mary Roe, Defendants," and numbered 54,989 in the files and records of the Superior Court of the State of Cali-

fornia, in and for the City and County of San Francisco, referred to in the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to*m*in said Bill of Complaint, to have been paid by affiant in the years 1911 and 1912 for doing the assessment work on the said 175 placer mining claims; affiant alleges that neither the sum of $1443.50, or any part of said sum, constitutes a part or portion of the said sum of $5,600 referred to in said Notice of Forfeiture and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant further answering the allegation of said Bill of Complaint denies that during the year 1911 and prior to the time any money is claimed to have been expended by affiant in the Notice of Forfeiture hereinabove referred to, or at any other time, or at all, affiant was indebted to the Henry E. Lee referred to [79] in the complaint, the duly authorized agent of complainant's predecessor in interest and his colocators, or the duly authorized agent of complainant's predecessor in interest, of his colocators, or to the said Lee in any other capacity, or as an individual, or personally, or at all, in the sum of $1,836, or in any other sum, or at all, and denies that the said Lee, acting as such agent for complainant's predecessor in interest and his colocators, or any of them, or that said Lee in any other capacity, or as an individual, or personally, or at all, directed affiant to use and utilize, all of the sum of $1,836, or any portion thereof, or so much

thereof as might be necessary, in the annual representation of the placer mining claims referred to in said Bill of Complaint for the years 1911 and 1912, or for the year 1911, or for the year 1912, or for any other year, or at all, and denies that affiant agreed with the said Lee that he would so utilize and use, or that he would so utilize or use, said money; affiant denies that the said sum of $1,836 is and should be, or is or should be, a portion of the money expended by affiant as described in the said Notice of Forfeiture; affiant denies that the said money and indebtedness, or money, or indebtedness, was money due and owing, or was money due or owing, to this complainant's predecessor in interest and his colocators, or to this complainant, or to complainant's predecessor in interest, or his colocators from affiant; affiant denies that said money should be credited to this complainant and his co-owners, or to this complainant or to his co-owners in proportion to their relative interests in the said 175 placer mining claims; affiant denies that he has at any time whatsoever owed to the said Lee and to complainant, complainant's predecessors in interest and his co-owners, or to said Lee, or to complainant, or to complainant's predecessors in interest, or either of them, or to his co-owners, any sum or sums of money whatsoever; affiant alleges that the said Lee is now, and [80] for a long time prior to the date hereof, has been indebted to affiant in a sum in excess of $2,000, that said sum is now wholly due, and owing, from the said Lee to affiant and unpaid;

Further answering the allegation above referred

to, affiant alleges that the facts and circumstances relating to the signing and delivery of the written acknowledgment of indebtedness to said Henry E. Lee, in the sum of $1,836 referred to in said Bill of Complaint are as follows: That at or just prior to the time of the signing and delivery of said written acknowledgment, and several months prior to December, 1911, said Henry E. Lee was indebted to affiant in a large sum, and that said Lee stated that if affiant would endorse said Lee's note in order that said Lee might thereby obtain a loan, said Lee would repay affiant the amount said Lee then stood indebted to affiant, that said Lee then requested affiant to so endorse the promissory note of said Lee in order that said Lee might negotiate the same and procure a loan, that affiant refused to endorse the note of said Lee, whereupon said Lee requested that affiant give said Lee a written acknowledgment of indebtedness from affiant to said Lee, in order that said Lee might obtain a loan on his, said Lee's promissory note secured by an assignment of said written acknowledgment of indebtedness, that said Lee requested that said written acknowledgment of indebtedness be given in some odd sum in order that a possible lender might not suspect that the same had been given as an accommodation, that affiant acceded to the said request of said Lee and gave said Lee a written acknowledgment of indebtedness in the sum of $1836, for the purpose of enabling said Lee to repay affiant the amount of said Lee's indebtedness to affiant, that affiant received no consideration for said written acknowledgment, either past or present that

said Lee was unable to procure a loan on the security of said written acknowledgment, that the same has never been negotiated and is wholly without [81] consideration of any kind whatsoever, or at all;

That affiant alleges that the sum of $1,000 alleged in said Bill of Complaint to have been paid by said Henry E. Lee, as the agent and representative of complainant's predecessor in interest and his co-locators to affiant for complainant's predecessor in interest and his colocators, was actually paid to affiant on or about the 18th day of January, 1912, that at the time said sum was so paid to affiant, said Lee was indebted to affiant in a large sum, to wit, in a sum in excess of $1000, that affiant elected to and did treat said payment of said $1000 as a payment on account of said indebtedness of said Lee to affiant, that affiant does now elect to so treat said payment of said $100 as a payment on account of the indebtedness of said Lee to affiant, that said sum of $1000 was not advanced for or on behalf of the complainant's predecessor in interest and his co-locators herein or any or either of them, but, so far as this affiant knows and to the best of his knowledge and belief, solely on behalf of said Lee himself;

Affiant alleges on his information and belief that complainant is financially irresponsible and unable to pay his or any proportion of the money expended in doing the assessment work on said claims during the years 1911 and 1912;

Affiant further alleges that complainant has an adequate remedy at law, by way of payment of the complainant's proportion of the sum so expended

for the performance of assessment work for the years 1911 and 1912, and the demanding, procurement and recordation of a receipt for said payment as provided by section 1426o of the Civil Code of the State of California, that the recordation of such receipt as effectually removes any cloud arising from the recordation of the affidavit of service of Exhibit "A," as any decree of this Court, or any other Court, can or will; and that affiant is irreparably injured in the event [82] that complainant neglects or refuses to pay his said proportion of said sum, in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of the service of the same within 90 days after said service, as required by section 1426o of the Civil Code of the State of California, affiant being restrained from recording said affidavit of service by order of the above-entitled Court.

THOMAS W. PACK.

Subscribed and sworn to before me this 16th day of December, 1914.

[Seal] ELMER L. KINCAID,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. B.58–Equity. United States District Court, Southern District of California. (Original.) Cecil C. Carter, Complainant, vs. Thos. W. Pack, Stella Schuler and Joseph K. Hutchinson, Defendants. Affidavits of Joseph K. Hutchinson, Stella Schuler and Thomas W. Pack. Filed Dec. 16, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pursuant to Rule 49, E.

L. Bell, Attorney at Law, 737 Consolidated Realty Bldg., Los Angeles, Cal., is hereby designated as the person on whom to serve papers in this cause. Joseph K. Hutchinson, Attorney for Defendants, San Francisco, Calif. [83]

[Order Continuing Hearing to December 21, 1914.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Friday, the eighteenth day of December, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

B. 58—EQUITY.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause coming on this day to be heard on a motion for an order vacating and dissolving a temporary restraining order heretofore made and entered herein; now, on the Court's own motion, it is ordered that this cause be, and the same hereby is continued until Monday, the 21st day of December, 1914, at 9:30 o'clock A. M. [84]

[Order Denying Motion for Order Vacating Temporary Restraining Order etc.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the twenty-first day of December, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 58—EQUITY.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause coming on this day to be heard on defendants' motion for an order vacating and dissolving the temporary restraining order heretofore made, filed and entered herein; John B. Clayberg, Esq., appearing as counsel for complainant; Joseph K. Hutchinson, Esq., appearing as counsel for defendants; I. Benjamin, being present as shorthand reporter of the proceedings, and acting as such; now, on motion of John B. Clayberg, Esq., of counsel for complainant, it is ordered that R. P. Henshall, Esq., who is present in court, be, and he hereby is associated with said John B. Clayberg, Esq., as counsel for complainant; and said motion having been ar-

gued, in connection with the argument of a similar motion in cause No. B. 57–Equity, Cecil C. Carter, Complainant, vs. Thomas W. Pack et al., Defendants, in support thereof, by Joseph K. Hutchinson, Esq., of counsel for defendants, and in opposition thereto by R. P. Henshall, Esq., and John B. Clayberg, Esq., of counsel for complainant; and said cause having been submitted to the Court for its consideration and decision on said motion and the argument thereof; it is now by the Court ordered, that defendants' motion for an order vacating and dissolving the temporary restraining order heretofore made, filed and entered herein be, and the same herby is denied, [85] and it is further ordered that complainant be, and he hereby is enjoined from making, executing or delivering conveyance, or in any way conveying or disposing of title to the property involved in this cause during the pendency of this proceeding, and until the final determination of this cause on its merits, counsel for complainant to prepare an appropriate draft of order in accordance herewith for signature and entry. [86]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 58—EQUITY.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Order Denying Motion to Dissolve Temporary Restraining Order, etc.

BE IT REMEMBERED, that, on the 21st day of December, 1914, at 9:30 o'clock A. M. of said day, at the courtroom of the above-entitled court, in the City of Los Angeles, State of California, pursuant to notice duly given, the motion of the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, in the above-entitled proceeding for an order vacating and dissolving the temporary restraining order therefore and on the 15th day of December, 1914, issued in the above-entitled proceeding, came on regularly for hearing and was heard upon all the papers, records and proceedings in said above-entitled proceeding the defendants' notice of motion and upon the affidavits of Joseph K. Hutchinson, Thomas W. Pack and Stella Schuler on file in the above-entitled action, said defendants appearing by Joseph K. Hutchinson, Esq., their solicitor, and the complainant appearing by J. B. Clayberg,

Esq., and R. P. Henshall, Esq., his solicitors, whereupon said motion was argued and after being duly considered by the Court

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion [87] for an order vacating and dissolving the temporary restraining order heretofore and on the 15th day of December, 1914, issued in the above-entitled proceeding, be, and the same is, denied. It is further ordered, adjudged and decreed that the complainant herein, his attorneys, agents and representatives, or any, or either of them be, and they are, and each of them is hereby enjoined and restrained from making, executing or delivering any deed or other conveyance whatsoever or at all of the placer mining claims described in the Bill of Complaint on file herein, or any of said claims, or from in any way conveying his, or any of his, interests in and to said claims until the final determination of this proceeding or the further order of this Court.

Dated Los Angeles, Cal., December 21, 1914.

BENJAMIN F. BLEDSOE,
Judge.

[Endorsed]: No. B. 58—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Cecil C. Carter, Complainant, vs. Thomas W. Pack et al., Defendants. Order Denying Motion to Dissolve Temporary Restraining Order, etc. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K.

Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [88]

In the District Court of the United States, in and for the Southern District of California.

No. B. 58—Equity.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Assignment of Error.

NOW COME THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON, defendants above named, and make and file this their assignment of error:

I.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of December 21, 1914, in the above-entitled proceeding, which said order denied the motion of the above-named defendants for an order vacating and dissolving the temporary restraining order theretofore and on the 15th day of December, 1914, issued in the above-entitled proceeding.

II.

That the District Court of the United States, in and for the Southern District of California, erred

in giving, making and entering its order of December 21, 1914, in the above-entitled proceeding, wherein and whereby said Court refused to dissolve the temporary restraining order theretofore and on the 15th day of December, 1914, issued in the above-entitled proceeding.

San Francisco, Cal., December 23, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants. [89]

[Endorsed]: No. B. 58—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Cecil C. Carter, Complainant, vs. Thomas W. Pack et al., Defendants. Assignment of Error. (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco Cal. [90]

In the District Court of the United States, in and for the Southern District of California.

No. B. 58—Equity.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Petition for an Order Allowing an Appeal.

The above-named defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, conceiving themselves aggrieved by the order entered on the 21st day of December, 1914, in the above-entitled proceeding, which said order denied the motion of the above-named defendants for an order vacating and dissolving the temporary restraining order theretofore and on the 15th day of December, 1914, issued in the above-entitled proceeding, do, and each of them does, hereby appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

San Francisco, Cal., December 21, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants.

And now, to wit: on December 26, 1914, it is ordered that the foregoing appeal be allowed as prayed for, upon giving bond on appeal in sum of $250.00.

BENJAMIN F. BLEDSOE,
District Judge. [91]

[Endorsed]: No. B. 59—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Cecil C.

Carter, Complainant, vs. Thomas W. Pack et al., Defendants. Petition for and Order Allowing Appeal. (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk, By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [92]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 58—Equity.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That United States Fidelity & Guaranty Company, a corporation, duly incorporated under and by virtue of the laws of the State of Maryland and authorized by its charter and by law to become sole surety on bonds and undertakings, is held and firmly bound unto Cecil C. Carter in the full and just sum of Two Hundred Fifty Dollars ($250.00) lawful money of the United States, to be paid to the said Cecil C. Carter, his executors, administrators or assigns; to which payment the said United States Fidelity & Guaranty Company binds itself by these presents.

In Witness Whereof, the United States Fidelity & Guaranty Company has caused these presents to be executed by its duly authorized attorney in fact and has caused these presents to be sealed with the seal of the United States Fidelity & Guaranty Company on this 26th day of December in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately, at a District Court of the United States for the Southern District of California, Southern Division, in a suit depending in said Court between said Cecil C. Carter as [93] complainant and Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, as defendants, an order was given on the 21st day of December, 1914, in the above-entitled proceeding, which said order denied the motion of the above-named defendants for an order vacating and dissolving the temporary restraining order theretofore and on the 15th day of December, 1914, issued in the above entitled proceeding, and the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, having obtained or being about to obtain an order allowing an appeal to reverse the said order in the aforesaid suit and a citation directed to the said Cecil C. Carter citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days from the date thereof;

Now the condition of the above obligation is such that if the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson shall prosecute and appeal to effect, and answer all damages and costs if they fail to make

(Seal)
F. M. K.
N. P.

their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

The premium on this bond is 500.

W. H. SCHRODER,
Atty. in Fact.

(Cancelled Internal Revenue Stamps 2½¢.)

[Corporate Seal]

UNITED STATES FIDELITY & GUARANTY COMPANY,
By W. H. SCHRODER,
Its Attorney in Fact.

The addition of the words "and" and "all" in line 17 hereof is made with full authority of the United States Fidelity and Guaranty Company.

W. H. SCHRODER,
Atty. in Fact.

State of California,
County of Los Angeles,—ss.

On this 26th day of December, in the year one thousand nine hundred and fourteen, before me, Frank M. Kelsey, a Notary Public in and for said County and State, residing therein, duly [94] commissioned and sworn, personally appeared W. H. Schroder, known to me to be the duly authorized attorney in fact of THE UNITED STATES FIDELITY AND GUARANTY COMPANY, and the same person whose name is subscribed to the within instrument as the attorney in fact of said Company, and the said W. H. Schroder duly acknowledged to me that he subscribed the name of THE UNITED STATES FIDELITY AND GUARANTY COM-

PANY thereto as Principal and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] FRANK M. KELSEY,
Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. B. 58—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Cecil C. Carter, Complainant, vs. Thomas W. Pack et al., Defendants. Undertaking on Appeal. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Form and Sufficiency of Surety to within undertaking approved this 26th day of December, 1914. Benjamin F. Bledsoe, Judge. Charles W. Slack, Joseph K. Hutchinson, Solicitors for defendants, 923 First National Bank Bldg., San Francisco, Cal. **[95]**

In the District Court of the United States, in and for the Southern District of California.

No. B. 58—Equity.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Praecipe for Record on Appeal.

To the Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division:

Sir:——

You are hereby instructed to prepare a certified copy of the record in the above-entitled proceeding for use upon an appeal from the order heretofore given, made and entered in the above-entitled proceeding on the 21st day of December, 1914, which said order denied the motion of the above-named defendants for an order vacating and dissolving the temporary restraining order therefore and on the 15th day of December, 1914, issued in the above-entitled proceeding; said record will be made up of the following papers, records and proceedings in the above-entitled proceeding:

The bill of complaint therein;

The temporary restraining order and order to show cause given, made and entered therein on the 15th day of December, 1914;

The notice of motion of the above-named defendants for an order vacating and dissolving the temporary restraining order theretofore and on the 15th day of December, 1914, issued in the above-entitled action, which said notice of motion was [96] filed and is marked as filed in the above-entitled proceeding on the 16th day of December, 1914.

The affidavit of Thomas W. Pack, one of the defendants above named, which said affidavit is referred to in said notice of motion last above named, and

which said affidavit was used upon the hearing of said motion last above referred to, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 16th day of December, 1914;

The affidavit of Stella Schuler, one of the defendants above named, which said affidavit is referred to in said notice of motion last above named, and which said affidavit was used upon the hearing of the motion just referred to, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 16th day of December, 1914;

The affidavit of Joseph K. Hutchinson, one of the defendants above named, which said affidavit is referred to in said notice of motion last above named, and which said affidavit was used upon the hearing of said motion just referred to, and which said affidavit is filed and is marked as filed in the above-entitled proceeding on the 16th day of December, 1914;

The minute order of the above-entitled Court continuing said motion last above named from the 18th day of December, 1914, to the 21st day of December, 1914, at 9:30 o'clock A. M.;

The order given, made and entered in the above-entitled proceeding on the 21st day of December, 1914, which said order denied said motion for an order vacating and dissolving the temporary restraining order theretofore and on the 15th day of December, 1914, issued in the above-entitled proceeding, and [97] which said order refused to dissolve the temporary restraining order last above mentioned;

The, or any, Opinion of the above-entitled Court in the above-entitled proceeding given upon the making of the order denying said motion for an order vacating and dissolving the temporary restraining order above referred to;

The assignment of error of the above-named defendants filed with their petition for an order allowing the appeal above specified and referred to;

You will forthwith make up your certified copy of the foregoing papers and transmit the same, with the original petition for an order allowing an appeal and the citation issued thereon, with the return of the service of said citation, to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

San Francisco, Cal., December 23, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants.

Service of the within praecipe for record on appeal this 23d day of December, 1914, is hereby admitted.

H. L. CLAYBERG.
CLAYBERG & WHITMORE,
Attorneys for Complainant.

[Endorsed]: No. B. 58—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. Cecil C. Carter, Complainant, vs. Thomas W. Pack et al., Defendants. Praecipe for Record upon Appeal. (Order of Dec. 21, 1914). Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K.

Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [98]

[Certificate of Clerk, U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 58—EQUITY.

CECIL C. CARTER,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing ninety-eight (98) typewritten pages, numbered from 1 to 98 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the bill of complaint, temporary restraining order and order to show cause, notice of motion of defendants for order vacating and dissolving temporary restraining order, affidavits of Joseph K. Hutchinson, S. Schuler and Thomas W. Pack, respectively, minute orders of December 18 and 21, 1914, respectively, order denying motion for order vacating and dissolving temporary restraining order, assignment of error, petition for and order allowing appeal,

undertaking on appeal, and praecipe for transcript of record on appeal in the above and therein-entitled action; and I do further certify that the above constitute the record on appeal in said action as specified in the said praecipe for transcript of record on appeal, filed on behalf of the appellants [99] in said action.

I do further certify that the cost of said transcript is $64.50, the amount whereof has been paid me by Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, the appellants in said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of December, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Ten Cents Internal Revenue Stamp. Canceled Dec. 30, 1914. Wm. M. V. D.] [100]

[Endorsed]: No. 2538. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. Cecil C. Carter, Appellee. Transcript of Record. Upon Appeal from the United

States District Court for the Southern District of California, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

7

No. 2538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

CECIL C. CARTER,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco,
JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco,
Solicitors for Appellants.

Filed this .....day of February, 1915.

FRANK D. MONCKTON, Clerk.

By .....Deputy Clerk.

No. 2538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

CECIL C. CARTER,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Statement.

There are five appeals before this court, in addition to this one, in which the material facts involved are almost precisely the same as the facts in the present appeal. This may be said with regard to the questions of law raised in the five appeals as well as in the present one. Two of the five appeals (Nos. 2539 and 2540) are before the court on appeals from orders denying motions to dissolve injunctions pendente lite. The remaining three of the five appeals (Nos. 2535, 2536 and 2537)

are before this court on appeals from orders granting injunctions pendente lite. In the five appeals referred to the parties are throughout the same, to wit, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee.

In the present case the appellants are the same as the appellants in the five appeals referred to.

The appellee is Cecil C. Carter. The appeal is from an order denying a motion, made under Equity Rule No. 73, to dissolve the temporary restraining orders issued by the court ex parte and without notice to the appellants (Tr., pp. 54 to 56).

Despite the difference in party appellee the subject matter of the present appeal, as has already been stated, is, in the truest sense, entirely similar in its material features to the subject matter of the five appeals in which E. Thompson is appellee. In the present case there is additional, not different, matter. In other respects, the bill of complaint follows word for word, with appropriate changes showing the difference in party appellee, the bill of complaint found in the transcript in appeal No. 2535. The affidavits filed in opposition to the bill follow almost word for word, with said appropriate changes, the affidavits of defendants and appellants found in the transcript in cases Nos. 2539 and 2540.

Briefs containing discussions of the facts of the appeals, together with citations in support of the

rules contended by appellants to be determinative of such appeals, have been filed, one for cases Nos. 2535, 2536 and 2537, and one for cases Nos. 2539 and 2540. In view of the similitude already pointed out, to file another brief in the present case would be but an imposition upon this court in the form of a repetition of a statement of facts found in the briefs on file in the companion appeals, and in the form of a duplication of points and authorities.

In the carrying out of appellants' desire to place before this court all the matters involved in the six companion appeals, including the present one, in as brief and at the same time, as effective a form as is possible, appellants respectfully submit herein only a discussion of the few respects in which matter in the present appeal is additional to that found in the five other appeals. For a discussion of the matter in this appeal which resembles so closely the matter in the other five appeals, appellants most respectfully refer the court to the briefs on file in the other cases. This mode of discussion is adopted by appellants in the belief and hope that it may reduce, not only the length of the record, but also the amount of labor involved in understanding the same.

As has already been suggested the bill of complaint in the present appeal follows the bill of complaint found in case No. 2535. For a summary of this bill reference is made to the statement of

the case found in the brief filed in cases Nos. 2535, 2536 and 2537, pages 1 to 26 thereof, and particularly to the footnote found on page 21. Reference to this footnote calls attention to the fact that in the present appeal 175 of the placer mining claims in dispute are involved.

It is in the allegation of the title under which the complainant in the present case claims, that the matter is found that is matter additional to that embodied in the bill of complaint in case No. 2535. Complainant Carter claims to have become the owner of an undivided one-eighth interest in said 175 placer claims on November 28th, 1914 (Tr. p. 4). He claims as the successor in interest of one F. Kimball, who, in turn, acquired his interest by deed dated June 10th, 1912, but not recorded until November 30th, 1914, from one of the original locators, to wit, P. Perkins (Tr., p. 10). P. Perkins, it is alleged, died in the State of Colorado some months prior to the filing of the bill (Tr., p. 11). The service of the Notice of Forfeiture is alleged to have been made upon the "administrator, personal representative, executors or heirs" of said P. Perkins (Tr., p. 11). The bill of complaint, unlike the bills in the companion cases which were filed on November 24th, 1914, was not filed until December 12th, 1914 (Tr., p. 46). Thereafter, and on December 15th, 1914 (Tr., p. 49), a temporary restraining order was issued ex parte, directed against the appellants and following the terms of the temporary restraining orders and injunctions

pendente lite issued in cases Nos. 2535, 2536 and 2537 (Tr., pp. 47 to 54).

On the day after temporary restraining orders were issued defendants and appellants gave notice, under Equity Rule No. 73, of motion for an order vacating and dissolving the temporary restraining order (Tr., pp. 54 to 56). The motion was made upon the same grounds as those upon which motion was made to dissolve the injunctions pendente lite in cases Nos. 2539 and 2540, to wit: (1) that the allegations of the complainant's bill on file in the cause, taken in connection with the allegations contained in the affidavits served with the notice of motion, shows that complainant is not entitled to the temporary restraining order; (2) that the cause does not present a case for the issuance of a temporary restraining order; (3) that defendants, and each of them, will be irreparably injured if said order is not vacated and dissolved; (4) that said order does not provide for any security for defendants' costs and damages, and it appears from the affidavit served with the notice of motion that the complainant is financially irresponsible (Tr., p. 55).

With the notice of motion were served affidavits of defendant Hutchinson, defendant Schuler, and defendant Pack. These affidavits contain the same matter found in the affidavits filed in cases Nos. 2539 and 2540, for a summary of which reference is made to pages 24 to 35 of the brief on file in the said last mentioned cases. In addition to containing

matter similar to that found in the affidavits in the companion cases, there are found in the affidavit of the defendant Hutchinson (1) allegations challenging the complainant's title and, therefore, the right of the complainant to file the bill in the above-entitled cause (Tr., pp. 57 to 63), as well as (2) a positive and unequivocal denial (Tr., pp. 73 and 74) of the allegations in section XXII in the bill of complaint (Tr., pp. 36 and 37), that while complainant's predecessors in interest and their co-locators were engaged in the performance of annual representation upon the 175 placer claims for the year 1912, they were forcibly prevented from completing said annual representation upon the whole of said 175 claims by the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and that the employees of complainant's predecessors in interest and co-locators were forcibly ejected and driven from said claims by said companies, or by each and all of them, or by their or each of their agents, employees, representatives, servants or attorneys.

The matter set forth in the affidavit of the defendant Hutchinson, calling in issue complainant's title, alleges: That P. Perkins, one of the original locators of the 175 placer mining claims, died at Colorado Springs, El Paso County, Colorado, in the early part of 1914; that one George M. Irwin was thereafter, by the District Court of the State

of Colorado, in and for said County of El Paso, duly appointed administrator of the estate of P. Perkins, and that said Irwin still is said administrator; that in November, 1914, said Irwin, as said administrator, wrote to defendant Hutchinson offering, as said administrator, to sell to said Hutchinson all of the interest of the estate of said Perkins in said placer mining claims; that defendant Hutchinson thereupon, and in November, 1914, accepted said offer; that defendant Hutchinson thereupon, and with the consent of said Irwin as said Colorado administrator, commenced proceedings for the appointment of an administrator of P. Perkins' estate in the Superior Court of the State of California, in and for the County of San Bernardino; that the purpose of said proceedings was to obtain a proper order from said Superior Court directing the California administrator of the Perkins' estate to sell to said Hutchinson, or otherwise as the said court might direct, said one-eighth interest of the Perkins' estate in said claims; that the public administrator of San Bernardino County has been appointed by said Superior Court as the California administrator of the Perkins' estate; that the interest of the Perkins' estate in said placer mining claims is the only property in the State of California belonging to the estate of the decedent; that it is the intention of the defendant Hutchinson to, if the same be possible and legal, through said Superior Court, and by its order and under its direction, purchase from said Perkins' estate said

interest in said placer mining claims, and thus to consummate the agreement theretofore entered into, in November, 1914, between defendant Hutchinson and the Colorado administrator of the Perkins' estate (Tr., pp. 57 to 59).

The defendant Hutchinson further alleges: That on December 14th, 1914, he, for the first time, learned of the allegations contained in the bill of complaint in this case with reference to the conveyance alleged to have been made from the decedent P. Perkins and Sylvia Perkins, his wife, to one F. Kimball, on or about June 10th, 1912; that the defendant Hutchinson thereupon, and on December 14th, and because of the correspondence that he had theretofore had with the said Irwin as the Colorado administrator of the Perkins' estate, telegraphed from Los Angeles, California, to the said Irwin at Colorado Springs, Colorado, informing said Irwin of the filing of Carter's bill in the United States District Court, and of the allegations therein contained with reference to the alleged existence of a deed from Perkins to one F. Kimball. In this telegram the defendant Hutchinson requested an immediate telegraphic reply from administrator Irwin throwing light upon the validity or invalidity of the transfer alleged in Carter's bill of complaint (Tr., pp. 60 and 61). To this, on the same day, administrator Irwin responded by telegraph: That Mrs. Perkins had no recollection of having made a deed to Kimball, although she was not sure; that if there was any such deed it was deliv-

ered to Lee (the person who verified the bill of complaint on file in this case), for the purpose of concluding sale of the property and was without consideration. Following this the defendant Hutchinson again telegraphed to administrator Irwin on December 14th asking if proof to support the assertion that the deed was without consideration would be available in Colorado Springs. To this, on December 15th, administrator Irwin replied that Mrs. Perkins would testify that there was no consideration for the Kimball deed, if there was such a deed (Tr., pp. 61 and 62).

Basing his allegation on the sources which he set forth in the form of the heretofore referred to telegrams, the defendant Hutchinson thereupon alleges upon his information and belief that the deed from Perkins and wife to Kimball (complainant Carter claiming by deed from Kimball) was never delivered to the grantee named therein, nor was there any consideration whatsoever therefor.

The defendant Hutchinson positively alleges that the F. Kimball referred to in the bill of complaint and named as grantee in the alleged deed from Perkins and wife is, and at all times mentioned was, a resident and citizen of the State of California, and a resident of the City of Oakland, County of Alameda; that the said Lee, who verified the bill of complaint, and the said Kimball had known each other for several years; that the said Kimball does not know, nor has he ever known, the said

P. Perkins and the said Sylvia Perkins, or either of them (Tr., pp. 62 and 63).

Upon the hearing of the motion no counter affidavits whatsoever were filed by the complainant. Thereafter, and upon the hearing of said motion and argument thereon, the District Court denied said motion (Tr., pp. 98 to 101).

Thereafter, and within the time allowed by statute, appellants took their appeal from said order to this Honorable Court (Tr., p. 104).

Specification of Error.

Appellants urge as error the action of the District Court in giving, making and entering its order of December 21st, 1914, by which the court denied appellants' motion for an order vacating and dissolving its temporary restraining order theretofore, and on the 15th day of December, 1914, issued.

Appellants urge that the error of the District Court is a fundamental one: That even if appellee's bill, uncontroverted, had sufficient equity to merit injunctive relief, the affidavits filed on the motion to dissolve the temporary restraining order overcame that equity, and called for a vacation and dissolution of said order.

Conclusion.

In the light of the authorities collected in the briefs on file in cases Nos. 2535, 2536, 2537, 2539 and

2540, and of their application to the facts of the instant case, we respectfully urge two errors on the part of the District Court:

1. (a) The erroneous hypothesis of pertinent fact upon which the lower court proceeded in the issuance of its temporary restraining order upon unverified material facts;

(b) The erroneous hypothesis of pertinent law in the issuance of the temporary restraining order upon the assumption that the case presented the equity necessary to warrant injunctive relief.

2. The improvident exercise by the District Court of its legal discretion in disregarding the cardinal equity principle that complainant for an injunction must present a case free from doubt.

Appellants therefore respectfully urge a reversal of the action of the District Court in granting a temporary restraining order, together with appellants' costs on this appeal incurred.

Dated, San Francisco,
February 1, 1915.

Respectfully submitted,

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Appellants.